CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND J. A. JONES CONSTRUCTION COMPANY, PETITIONERS,

vs.

MRS. FANNIE M. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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vs.

MRS. FANNIE M. FLOWERS

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[fol. 1]

IN THE CHANCERY COURT OF HAWKINS COUNTY, TENNESSEE

ORIGINAL BILL—Filed May 24th, 1945

To the Honorable J. H. Wallace, Chancellor, Holding Chancery Court at Rogersville:

MRS. FANNIE M. FLOWERS, in her own right, and for the use of her minor children, Thomas and Clarence Flowers, residents of Hawkins County, Tennessee, Petitioners,

vs.

AETNA CASUALTY AND SURETY COMPANY, a foreign corporation doing business in Tennessee, with an office and/or agents in Hawkins County, Tennessee; and J. A. Jones Construction Company, a foreign corporation doing business in Tennessee with offices and agents in more than one county in said State, especially an office and/or agency in the City of Knoxville, Knox County, and a Post office address and Post office Box 299, Defendants

I

Petitioner will show to the court:

That the defendant Construction Company is engaged in construction work and other work in behalf of the Federal Government, supplying munitions of war or other essential war material of a secret nature, unknown to the public, including its employees, over a large and undefined territory in Tennessee, and under a contract with the department of the Federal Government which contract, in compliance with the Federal Laws, requires the defendant provide compensation to its employees under State Workmen's Compensation laws. And was so engaged on and [fol. 2] before March 8th, 1945.

That the defendant Aetna Casualty and Surety Company was then and is now its insurer, under the State Workmen's Compensation Law and as such, under the state laws made jointly and severally liable along with the employer for any claims arising under said law.

That on March 8th, 1945, Edward E. Flowers, husband of the Petitioner and father of their two named minor children, aged 15 and 12 years respectively, was in the employment of the said contracting company as a carpenter and had been for an unknown period of time and that he and said defendant company had accepted and were working under the provision of the Tennessee Workmen's Compensation Law.

II

And on said day, namely March 8th, at about 3:45 P. M., while the said Edward E. Flowers was engaged in his labor for and assigned to him by the employer, working upon a scaffold or platform, he suffered injuries due to accident arising out of and in the course of his employment which accident was the direct and proximate cause of his death by falling from said platform and/or steps or ladder leading from the ground to said platform, into a concrete pit, from a height of many feet. And as a direct consequence of the accidental fall he suffered mortal injuries to his head, skull, neck and spine, from which he died before he could be moved to an emergency hospital.

And it is alleged that his exertions in his work immediately before the fall contributed directly to bringing about his physical condition and was a concurring cause in his accidental fall into the pit; and also, his falling into the concrete pit concurred and directly contributed to his injuries sustained by striking the hard surface of the pit which caused his death; all of said contributing and concurring [fol. 3] causes of the accident arose out of and in the course of his employment.

It is alleged he suffered a long and bloody head wound, leaving a large and gaping gash and a fractured skull together with the aforesaid injuries, anyone of which could have, and taken together, would cause his immediate death.

More specific details of the injuries and the causes are unknown to the petitioner, but the facts of the accident and the injuries were known or should have been known by the defendants since the accident happened upon its premises and in the presence of its employees and foreman and they took charge of the injured man immediately. The petitioner was not present and had no one there representing her or whom she knew and who would relay the facts to her.

Upon being notified she sent for the body of her deceased husband a distance of about 100 miles from her home, but the employer declined to release the body and she was required to make a trip there in person, when a demand was made of her by the employer for the right to hold a post mortem as a condition for the release of the body, and as an inducement in addition to the release of the body she was told that the result of the examination would make it more easy for her to collect compensation. Upon these inducements she consented, but she had no physician present representing her and she was not advised she had this right and by this conduct on the part of the employer she was denied the right of a qualified check upon the finds of the examination and she never has been furnished with a copy of the employer's experts' report upon the examination.

She was ignorant of the 30 days' notice to the employer, but a short while after the expiration of the 30 days, she gave the defendant the statutory notice by registered mail, a written registered receipt being requested and it was [fol. 4] received and duly signed by a person authorized to receive and receipt for the company's mail, all of which will be shown at the hearing. However, it is alleged that no formal notice was required under the shown facts for the defendant was fully advised with knowledge that the defendant was not in a like advantageous position to know the facts, and that the company acted upon the facts known to it and the formal notice could serve no useful purpose.

III

The petitioner has no exact knowledge of the weekly average wage, including overtime wages, earned by the deceased, whom she believes to have been in the employment of the defendant for a period longer than one year. The payrolls of the defendant company will establish the weekly average and it is called upon to produce the records along with its answer, or to decline, in order that she can take steps to procure them before the hearing.

It is alleged that 60% of his average weekly wages over the statutory period of payment is in excess of the maximum sum of $5,000.00, which she is permitted to recover and for this reason she sues in her own right and on behalf of her said minor children for said sum, together with the statutory burial fund allowed.

And she asks the Court to fix the fees of her attorney as contemplated by the Statute.

IV

Premises Considered, Petitioner Prays:

1

That the defendant Aetna Casualty & Surety Company be made a party defendant by the issuance of process directed to the Sheriff of Hawkins County, to be served upon its local [fol. 5] agent, and that counterpart process be issued to the Sheriff of Knox County to be served upon the co-defendant J. A. Jones Construction Company Incorporated, through its local office there, and that both defendants be required to answer the petition in the time required by law under the rules of this Court, but their oaths to their answers are expressly waived.

2

That upon the hearing the Court determine and find that the employee Edward E. Flowers sustained the accidental injuries while in the employment of the defendants, which injuries were the direct concurring and contributing proximate cause of his accidental death and were sustained in the course of his employment and arose out of the same; and that the petitioner is entitled to recover on her and her children's behalf the maximum sum allowed under the law, which sum *if* less than 60% of his weekly average wages and that she recover the burial expenses in the sum fixed under the Statute from the defendant or either of them, and the costs of the cause.

3

That she have all other, further and general relief.

(Signed) Fannie M. Flowers.

Portrum & Portrum.

STATE OF TENNESSEE,
Hawkins County:

The Petitioner, Fannie M. Flowers, being duly sworn, makes oath that the contents of her petition are true to the best of her knowledge and belief, and that due to her

poverty she is unable to bear the expenses of this suit and she verily believes that the redress sought is just.

(Signed) Fannie M. Flowers.

Sworn to and subscribed before me this 24th day — [fol. 6] May, 1945. (Signed) Juno G. Altom, Clerk & Master. (Seal.)

[fol. 7] IN THE CHANCERY COURT OF HAWKINS COUNTY

SUBPOENAS TO ANSWER AT RULES IN CHANCERY AT ROGERSVILLE, TENNESSEE

Issued 24th day of May, 1945, (Signed) Juno G. Altom, Clerk & Master.

No. 1565

Came to hand on the 24th day of May, 1945, and was executed by reading the same to Lawrence Rolfe, as the agent for defendant Aetna Casualty & Surety Co., and leaving a certified copy of the original bill in the hands of Lawrence Rolfe, Agent.

This 26th day of May, 1945.

(Signed) James Carpenter, Deputy Sheriff.

STATE OF TENNESSEE,
Chancery Court at Rogersville.

To the Sheriff of Hawkins County, Greeting:

Summon Aetna Casualty & Surety Company (certified copy of bill attached) if to be found in your county, to appear in person or by attorney before the Chancery Court at Rogersville on or before the first Monday of June, 1945, it being Rule Day of said Court, to answer the Original Bill which Mrs. Fannie M. Flowers has filed in said Court against it and others, and have you then and there this writ.

Witness, Juno G. Altom, Clerk & Master of our said Court, at office in Rogersville, Tennessee, this 24th day of May, 1945.

(Signed Juno G. Altom, Clerk & Master.

Notice

To the Above Named Defendant, Aetna Casualty & Surety Company:

You are hereby notified that you are required to make defense in this case on or before the Third Monday of June, or judgment pro confesso will be entered against you on the Third Monday of June, 1945.

(Signed Juno G. Altom, Clerk & Master.

[fol. 8] Counterpart Subpoena to Answer at Rules, in Chancery at Rogersville, Tennessee

No. 1565

Issued May 24th, 1945, Juno G. Altom, Clerk & Master.

Came to hand on the 4 day of June, 1945, and was executed by reading the same to V. N. Hacker, Emp. Supervisor, and leaving a copy of the Original Bill in the hands of V. N. Hacker, Emp. Supervisor for J. A. Jones Construction Co.

This 4 day of June, 1945.

(Signed) Hazen Kreis, Sheriff, by Henry Bryant, Deputy Sheriff.

Counterpart

State of Tennessee,

Chancery Court at Rogersville, Tennessee.

To the Sheriff of Knox County, Greeting:

Summon J. A. Jones Construction Company (certified copy of the original bill accompanying this writ) if to be found in your county, to appear in person or by attorney before the Chancery Court at Rogersville on or before the First Monday of June next, it being Rule Day of said Court, to answer the Original Bill which Mrs. Fannie M. Flowers etc., has filed in said Court against Aetna Casualty & Surety Company, et al., and have you then and there this writ.

Witness Juno G. Altom, Clerk & Master of our said Court, at office in Rogersville, Tennessee, this 24th day of May, 1945.

(Signed Juno G. Altom, Clerk & Master.

Notice

To the Above Named Defendant, J. A. Jones Construction Company:

You are hereby notified that you are required to make defense in this case on or before the Third Monday of [fol. 9] June, 1945, or judgment pro confesso will be entered against you on the third Monday of June, 1945.

(Signed) Juno G. Altom, Clerk & Master.)

[fol. 10] In the Chancery Court of Hawkins County

Notice of Filing Petition for Removal—Filed May 29, 1945

To Mrs. Fannie M. Flowers and to Portrum & Portrum, Her Attorneys:

You are hereby notified that Aetna Casualty & Surety Company and J. A. Jones Construction Company, the defendants in the above entitled cause, will, on the 29th day of May, 1945, file in said cause its petition for removal of said cause to the United States District Court for the Eastern District of Tennessee, Northwestern Division, together with its bond for removal, a copy of which is attached hereto, and that at 9:00 O'Clock A.M. on said date, or as soon thereafter as counsel can be heard, we will present to the Honorable J. H. Wallace, Chancellor, at his chambers in Clinton, Tennessee, the said petition and bond, and move for an entry of an order removing said cause aforesaid.

This 28th day of May, 1945.

(Signed) Clyde W. Key, Counsel for Petitioners.

Service of the foregoing notice was had by mailing copy thereof by United States mail, postage prepaid, to Portrum & Portrum, attorneys for the plaintiff, on this the 28th day of May, 1945.

(Signed) Clyde W. Key, Counsel for Petitioners.

[fol. 11] In the Chancery Court of Hawkins County.

PETITION FOR REMOVAL—Filed May 29, 1945

[File Endorsement omitted]

The petitioners, Aetna Casualty & Surety Company and J. A. Jones Construction Company, respectfully show unto the Court:

1. That they are the sole defendants in the above entitled action, now pending in the Chancery Court of Hawkins County, Tennessee; that your petitioners, as such defendants, are required to appear and make defense to the petition filed herein on the first Monday of June, 1945, and that the time therefor has not expired.

2. That the cause of action stated in plaintiff's original petition is this:

That on or about the 8th day of March, 1945, the plaintiff's husband, E. E. Flowers, was an employee of the petitioner J. A. Jones Construction Company; that on the date aforesaid, both said employer and employee were operating under and subject to the provisions of the Tennessee Workmen's Compensation Act; that on said date the plaintiff's husband received bodily injuries arising out of and in the course of such employment, which injuries have resulted in his death; that at the time of said injury the average weekly wage of plaintiff's husband was in excess of $30.00, and that on account of said facts your petitioners are indebted to the plaintiff in the amount of $5000.00, and therefore plaintiff has demanded a judgment against your petitioners in said sum of $5000.00.

3. Petitioners further show that the amount in controversy in said cause of action exceeds the sum of $3,000.00, exclusive of interest, penalty and costs, as in plaintiff's original petition is alleged.

4. Petitioners further show that the plaintiff, Mrs. Fannie M. Flowers, at the time of the bringing of said action, and ever since, has been and still is a citizen of the State of Tennessee; that the petitioner Aetna Casualty & Surety [fol. 12] Company, at the time of bringing of said action, and ever since, has been and is a corporation organized and existing under the laws of the State of Connecticut,

and is a citizen of that State; that at the time of the bringing of this suit, petitioner J. A. Jones Construction Company was and now is a corporation organized under the laws of the State of North Carolina, and a citizen of that State; that the controversy in said cause of action is entirely between citizens of different States, and that your petitioners desire to remove said cause from the said Chancery Court of Hawkins County, Tennessee, to the United States District Court for the Eastern District of Tennessee, Northeastern Division, sitting at Greeneville.

5. Petitioners file herewith and present to the Court their bond in the penalty of $500.00, and they pray that the same may be accepted and approved by this Court, and that said cause be removed to the said United States District Court for the Eastern District of Tennessee, Northeastern Division.

(Signed) Clyde W. Key, Counsel for Petitioners.

Duly sworn to by C. W. Key. Jurat omitted in printing.

[fol. 13] IN THE CHANCERY COURT OF HAWKINS COUNTY

[File Endorsement omitted]

ORDER OF REMOVAL—Filed June 5, 1945

The defendants, Aetna Casualty & Surety Company and J. A. Jones Construction Company, having within the time provided by law filed their petition praying for the removal of this cause to the United States District Court for the Eastern District of Tennessee, and having at the same time filed their bond in the penal sum of $500.00, with good and sufficient surety, and conditioned according to law, it is, on motion of counsel for said defendants, ordered, adjudged and decreed:

1. That said petition be and it is hereby accepted, and said bond is approved.

2. That the above entitled cause be removed to the United States District Court for the Eastern District of Tennessee, Northeastern Division, and that all further proceedings in this Court be stayed.

3. The Clerk of this Court is directed to certify and transmit to the said District Court a transcript of all proceedings in this cause in this Court, and to file such transcript with the Clerk of said United States District Court within thirty days from the filing of the petition for removal herein.

Enter,

(Signed) J. H. Wallace, Chancellor.

[fol. 14] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE

MOTION TO DISMISS—Filed June 28, 1945

Come the defendants, Aetna Casualty & Surety Company and J. A. Jones Construction Company, and, entering their appearance herein specially for the sole purpose of making this, their motion to dismiss, move the Court to dismiss this suit and the complaint filed herein, for this:

That at no time has the defendant J. A. Jones Construction Company, a corporation, engaged in business in Hawkins County, Tennessee, nor had therein any officer, director, agent, or any other person upon whom leading process might lawfully be served in said County. The alleged accident forming the basis of plaintiff's cause of action occurred in Roane County, Tennessee, in which County the defendant J. A. Jones Construction Company on the 8th day of March, 1945, and continuously thereafter, has had, and now has, general offices, officers and agents upon whom leading process may lawfully be served. Accordingly, the Chancery Court of Hawkins County, Tennessee, whence this cause was removed to this Court, did not have jurisdiction of plaintiff's alleged cause of action or of these defendants, the venue of said alleged cause of action being limited to Roane County, Tennessee. (Brown vs. Stone & Webster Engineering Corporation, 181 S. W. (2d) 148.)

Wherefore, these defendants move the Court to dismiss this suit.

(Signed) Clyde W. Key, Counsel for Defendants.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND—Filed July 12, 1945

And now comes the plaintiff and moves the Court to remand the above entitled cause to the State Court from which it was removed for trial, for the following reasons:

(1) This is not a removable suit, because not one of a civil nature in law or equity; and the Federal District Court has no original jurisdiction of the subject matter. (U. S. Code, Title 28, Sec. 41; id. 71.)

(2) The jurisdictional grounds of the State Court under the Worwmen's Compensation Law (Acts 1923, Chap. 84; Acts 1943, Chap. 117; Williams' Tenn. Code Sec. 6852, et seq.) is derived through a contractual relationship between the employer and the employee, and is optional with either or both; and by reason of the contractual relationship all contracting parties assume the obligations as well as the benefits of the State Workmen's Compensation Law, one of which is the peculiar procedure provided in State Courts for the determination of the controversy, contrary to the established procedure in any action of a civil nature at law or in equity, requiring the exercise of administrative power. And the employer having voluntarily brought itself within the State Courts' jurisdiction in this compensation case, is estopped to invoke the derivitive jurisdiction of the Federal Court.

(3) The petition fails to allege the Federal Court's jurisdiction of the subject matter as required under the Court's Rules. (General Rules of Pleading, Rule 8 (a), Claims for Relief.)

(4) And taking the allegations of the original bill as a whole, it appears that the Federal Court's jurisdictional amount is not established by the pleadings.

(5) The petitioners for the removal of this cause to this Court fail to comply with the Federal Statutes of [fol. 16] removal. (U. S. Code, Title 28, Sec. 72) and the condition precedent required thereby, in that they failed to comply with this provision, i.e., "Written notice of said petition and bond for removal *shall* be given to the adverse party *prior* to *filing* the same." No prior notice of inten-

tion to file was given adverse party as fully appears from the transcript of the proceeding sent up from the State Court.

Therefore, plaintiff says this Court has no jurisdiction to try and determine this case and prays that same be remanded to the Chancery Court of the Second Tennessee Division sitting at Rogersville, Tennessee, from which it came.

Portrum & Portrum, Solicitors; by Hal E. Portrum, Rogersville, Tennessee.

[fol. 17] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed November 28, 1945

This suit was brought by the widow under the Tennessee Workmen's Compensation Law in the Chancery Court of Hawkins County for benefits under the Act for the death of her husband, whom it is alleged met his death by accident in the course of his employment in either Roane or Anderson County. Service was had upon the local agent of the defendant, Aetna Casualty & Surety Company, with counterpart served on the employer, J. A. Jones Construction Company, in Knoxville, Tennessee, where it has an office and place of business.

The cause was removed to the District Court for the Eastern District of Tennessee, the Northeastern Division, where a motion to remand was made by the plaintiff and a motion to dismiss by the defendants.

Under the Workmen's Compensation Act the employer may be sued where the accident occurred or elsewhere, as provided in the Act, where the employer has an office or place of business, but the employer may not be brought into a county where he has no officer or agent or place of business by serving process upon the insurer. The insurer may be sued under the Act where the insured may be sued, but the insured may not be brought into the insurer's venue by counterpart process.

Since under the authority of Brown vs. Stone & Webster, 181 Tenn., 293, the Chancery Court of Hawkins County was not the proper venue, since the accident did not occur there and since the employer has no officer or place of

business in that county, removal from that court to the District Court for the Northeastern Division of the Eastern District of Tennessee does not confer jurisdiction upon that court. Since it is clearly necessary that the suit be instituted where the venue lies, the question of removability [fol. 18] need not be passed upon, but under the agreed facts since this court has no jurisdiction, by direct method to avoid the consumption of additional time the suit will be dismissed and an order may be prepared for approval and entry.

(Signed) Geo. C. Taylor, Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Entered December 7, 1945

This cause came on to be heard upon the motion of the defendants to dismiss this action upon the ground that the Chancery Court of Hawkins County, Tennessee, whence the suit was removed to this Court, did not have jurisdiction of the cause of action asserted in the pleading; and said motion, being argued by counsel and well understood and considered by the Court, was by the Court sustained.

It is accordingly ordered, adjudged and decreed that plaintiff's suit be and the same hereby is dismissed, and that the plaintiff shall pay the costs of the cause, for which let execution issue.

Approved for entry:

(Signed) Geo. C. Taylor, Judge.

O. K.

(S.) Hal E. Portrum, 12-3-45, Counsel for plaintiff;
Clyde W. Key, Counsel for Defendants.

[fol. 20] IN UNITED STATES DISTRICT COURT

APPLICATION FOR LEAVE TO APPEAL IN FORMA PAUPERIS UPON CERTIFICATE OF GOOD FAITH—Filed January 5, 1946

Mrs. Fannie M. Flowers, complainant, makes application for a cerificate of good faith and leave to appeal *forma pauperis* to the Circuit Court of Appeals (Sixth *District*) from a judgment of dismissal in this case, entered December

3rd, 1945, and in support hereof makes oath to the following facts;

That she is a citizen and resident of Hawkins County, Tenn., and because of her poverty she is unable to pay the costs of said appeal, or to give security for same, and that she believes she is entitled (upon advice of counsel) to the redress she seeks by such appeal; and that the only other persons interested in the cause of action are her two dependent children who share in the compensation sought under the Tennessee Workmen's Compensation Act, and she states that due to their poverty they are unable to pay the costs of the appeal, or to give security for same, and are entitled to the redress sought; and that she has entered into no agreement with her attorney on any contingent basis.

She states she is appealing in good faith as based upon the nature of appeal, to-wit:

This action was instituted in the Chancery Court of Hawkins County, Tennessee, to recover compensation under the Workmen's Compensation Statute, for injury to and death of her husband, against his employer and its insurer. The cause was removed to the Federal District Court by the defendants upon the grounds of diversity of citizenship. She made a motion to remand upon grounds hereinafter reviewed. The defendant filed a plea in abate-[fol. 21] ment in the Federal Court to the jurisdiction of the Hawkins County Chancery Court on the grounds the venue was in Anderson County (should have alleged Roane County), Tennessee, which plea to the State's Court's jurisdiction was sustained by District Judge and suit dismissed; the Court pretermitting the question of its own jurisdiction.

1st. It was error to sustain the plea in abatement to the State Court on the ground of venue. The Compensation Statute, (Williams Code sec. 6885) provides the suit may be instituted in county of the residence of the widow, but the Supreme Court has construed this section pari materia with other sections of venue (Code secs. 8640; 8643; 8669) making it necessary that a defendant must be suable in the county of the widow's residence. Such was the fact here. (154 Tenn. 134). The State Supreme Court gave effect to said provision of the statute, but the District Judge by his decision eliminated the provision entirely, by concluding

the insurer was suable only in the county of the employer, by this conclusion, "The insurer may be sued under the Act where insured may be sued, but the insured may not be brought into the insurer's venue by counterpart process."

This conclusion must have been based upon this provision of the Act, i. e., "All policies insuring the payment of compensation made under the Act, * * * must contain a clause to the effect that as between the employer and the insurer or insurers the notice to our knowledge of the occurance of the injury on the part of the insured employer shall be deemed notice or knowledge, as the case may be, on the part of the insurer or insurers; that the jurisdiction of the insured for the purpose of this Act shall be the jurisdiction of the insurer or insurers, * * *" (Williams Code sec. 6894). This provision pertains to the contents of the policy of insurance protecting the employer, and was not intended as an exemption to either the insured or the insurer of the provisions of the Act in reference to venue. And to construe it as repealing the provisions as to venue and thereby [fol. 22] eliminating entirely the right of the widow to sue in the county of her residence, notwithstanding the insurer is made jointly and severally liable by the Act, and who is suable in the widow's home county, is to bind her by the terms and provisions of the private contract between the employer and insurer, which was not the intent nor the correct construction of the Act. And to so construe it renders the quoted portion of the act unconstitutional, under the State Constitution, for it denies the widow her equal rights others enjoy under the venue laws of the State; and it confers upon the insurer a special right or exemption against suit in a county where is has an office and maintains an agent, while no other in like situation enjoys such special privilege.

2nd. It was error for the Court to pretermit the question of its own jurisdiction, raised by the motion to remand, and dismiss the case upon the question of state practice, because it was insisted the Federal Court had no jurisdiction.

3rd. The Court should have passed upon and sustained the motions to remand for the following reasons:

(1) The District Court has no original jurisdiction, the suit not being one of a civil nature in law or equity.

(2) The State's jurisdiction arises out of contractual relationship assenting to jurisdiction of the State Court.

(3) The Federal Court's jurisdictional amount is not established, the right to recover being contingent.

(4) The defendant failed to comply with the removal statute by failing to give prior notice of the filing of the petition to remove, or to give any legal notice.

The nature of this cause and appeal is based upon the technical record, which is relied upon to establish the bona fides of the applicant.

(Signed) Fannie M. Flowers, Applicant.

Portrum & Portrum, By Hal E. Portrum, Rogersville, Tennessee.

[fol. 23] STATE OF TENNESSEE,
County of Hawkins, ss:

Personally appeared before the undersigned authority, the applicant, Fannie M. Flowers, who states upon oath that the facts stated in the foregoing application are true, except those made upon information as indicates and these she believes to be true.

(Signed) Fannie M. Flowers.

Sworn to and subscribed before me, at office, this 4 day of January, 1946.

(Signed) Kate Watterson, Notary Public. (Seal.)

My Comm. expires April 16, 1949.

NOTICE TO DEFENDANT

To Clyde W. Key, Bank of Knoxville Building, Knoxville, Tenn., Attorney of record of the defendants Aetna Casualty and Surety Company and J. A. Jones Construction Company.

Notice is here given that the within application is filed, and under the practice as directed by the United States Appellate Courts, the Clerk will forward to the District Judge for action as soon as practical the application and an order.

(Signed) Hal E. Portrum, Attorney for Applicant.

[fol. 24] IN UNITED STATES DISTRICT COURT

ORDER CERTIFYING MERIT AND GOOD FAITH OF APPEAL, AND LEAVE TO PROCEED IN FORMA PAUPERIS—Entered January 8, 1946

In this cause Fannie M. Flowers, complainant, has filed application to proceed upon appeal in forma pauperis, supported by the oath of poverty as required by statute, and upon consideration of the application:

It is adjudged the appeal is taken in good faith, has merit, and the applicant is entitled and is given a certificate that the appeal is taken in good faith.

Approved for entry: (Signed) Geo. C. Taylor, District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 14, 1946

Notice is hereby given that Mrs. Fannie M. Flowers, complainant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the judgment of dismissal entered in this action on December 7, 1945.

Portrum & Portrum, By Hal E. Portrum, Attorney for Appellant, Mrs. Fannie M. Flowers, Rogersville, Tennessee.

[fol. 26] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed January 14, 1946

The appellant requests the following parts of the record be included in the record on appeal:

1. The original bill.

2. The subpoena to Hawkins County and the counterpart subpoena to Knox County.

3. Petition for removal.

4. Notice of removal, and service of notice (on accompanying page of notice.)

5. Order of removal.

6. Motion to remand.

7. Motion to dismiss.

8. Opinion of Court.

9. Order of dismissal.

10. Application to appeal in forma pauperis and certificate of good faith containing pauper's oath.

11. Order certifying merit and good faith.

12. Notice of appeal.

Notice is given that the questions relied upon on appeal are reflected in the application and oath showing merit.

Portrum & Portrum, By Hal E. Portrum, Rogersville, Tennessee.

[fol. 27] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—Filed February 11, 1946

The motion of appellant for leave to prosecute appeal in forma pauperis is granted, and appellant is directed to file four legible typewritten copies of record on appeal and of her brief.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CAUSE SUBMITTED ON BRIEFS WITHOUT ARGUMENT—April 2, 1946

Before Allen, Martin and Miller, JJ.

Upon former application, duly approved by this Court, this cause is submitted on briefs without oral argument.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered and filed April 17, 1946

Appeal from the District Court of the United States for the Eastern District of Tennessee

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, and the action remanded to the District Court for further proceedings consistent with the opinion.

[fol. 29] [File endorsement omitted]

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 10200

MRS. FANNIE M. FLOWERS, Appellant,

v.

AETNA CASUALTY & SURETY COMPANY, et al., Appellees

Appeal from the United States District Court of the Eastern District of Tennessee, Northeastern Division

OPINION—Filed April 17, 1946

Before Allen, Martin and Miller, Circuit Judges

MILLER, Circuit Judge:

The appellant complains of the order of the District Court dismissing this action for lack of jurisdiction, which involved the collateral action of the district judge in failing to rule upon the appellant's motion to remand the action to the state court.

The action was filed May 24, 1945, in the Chancery Court of Hawkins County, Tennessee, by the appellant Mrs. Fannie M. Flowers, as the widow of Edward E. Flowers,

suing in her own right and in behalf of two minor children aged 15 and 12 years respectively, to recover benefits under the Workmen's Compensation Law of Tennessee, accruing by reason of the death of her husband on March 8, 1945, resulting from an accident arising out of and in the course of his employment with the defendant J. A. Jones Construction Company, a North Carolina corporation. The insurance carrier, Aetna Casualty & Surety Company, a Connecticut corporation, was also made a defendant. The bill alleged that 60% of the decedent's average weekly wages over the statutory period of payment was in excess of $5,000, the maximum recovery provided by the Act. The petitioner prayed judgment for the maximum amount [fol. 30] together with burial expenses also recoverable under the Act. Summons against the Construction Company was directed to the Sheriff of Knox County, Tennessee, and served by him in that county. Summons against the Surety Company was executed in Hawkins County, Tennessee.

On May 29, 1945, the two defendants filed their petition to remove the action to the United States District Court for the Eastern District of Tennessee. The petition alleged that the plaintiff was a citizen of Tennessee; that the corporate defendants were citizens of North Carolina and Connecticut; that at the time of the death of the decedent his average weekly wage was in excess of $30.00, and "that the amount in controversy in said cause of action exceeds the sum of $3,000 exclusive of interest, penalty and costs." On June 5, 1945, the removal order was entered by the state court.

On June 28, 1945, the defendants moved the District Court to dismiss the complaint for the reason that the Construction Company had at no time engaged in business in Hawkins County, Tennessee, nor had any officer or agent in that county upon whom process might lawfully be served; that the accident occurred in Roane County, Tennessee, where the Construction Company maintained its general offices and officers and agents upon whom process could be lawfully served, and that by reason of such facts the Court of Hawkins County, Tennessee, did not have jurisdiction of the alleged cause of action or of the defendants, the venue of said cause of action being limited to Roane County, Tennessee.

On July 12, 1945, the plaintiff moved the Court to remand the action to the state court on the ground that the action was not a removable one, that the petitioners for removal failed to give the necessary notice to the adverse party prior to filing the petition and bond for removal, as required by § 72, Title 28, U. S. C. A., and that the jurisdictional amount was not established by the pleadings.

On November 28, 1945, the Court rendered an opinion holding that under the Workmen's Compensation Act of Tennessee the employer may not be sued in a county where he has no officer, agent or place of business by serving process upon the insurer and that he could not be brought into the insurer's venue by counterpart process, that the Chancery Court of Hawkins County was not the proper venue, that removal from that court to the U. S. District Court for the Eastern District of Tennessee did not confer [fol. 31] jurisdiction upon the Federal Court, that the question of removability need not be passed upon, and since the District Court had no jurisdiction and in order to avoid the consumption of additional time the action would be dismissed. An order was accordingly entered on December 7, 1945, dismissing the action on the ground "that the Chancery Court of Hawkins County, Tennessee, whence the suit was removed to this court, did not have jurisdiction of the cause of action asserted in the pleading." This appeal followed.

Counsel discussed at some length the question of proper venue under the law of Tennessee and also whether or not sufficient notice was given of the filing of the petition to remove. But from the view which we take of the case, as hereinafter indicated, it becomes unnecessary to rule on those issues.

Plaintiff's recovery, if any, is controlled by the provisions of the Workmen's Compensation Law of Tennessee, as contained in §§ 6851-6901 of the Code of Tennessee. Although these statutory provisions are not pleaded either by the bill or by the petition of removal, yet the District Court and this Court take judicial notice of them. *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Norfolk & W. Ry. Co.* v. *Norton Iron Works*, 279 Fed. 32 (C. C. A. 6th). They provide that in all cases of death of an employee covered by the Act sixty percentum of the average weekly wages shall be paid in cases where the deceased employee leaves dependents, subject to maximum compensation of $18.00 per week, and a

total compensation not exceeding $5,000 exclusive of medical, hospital and funeral benefits. Burial expenses of the deceased employee are provided for not exceeding $150.00. Compensation is payable during dependency not exceeding 400 weeks, with payments to be made at the intervals when the wage was payable to the employee. Upon remarriage of the widow, if there is no child, compensation terminates, but if there is a child or children under the age of 18 such child or children shall have the status of orphans. An orphan receives compensation only during the time he or she is under 18 years of age. Under these circumstances we are of the opinion that the jurisdictional amount of $3,000, exclusive of interest and costs, is not involved. Although the bill seeks recovery of $5,000 and the petition for removal alleges that the amount in controversy exceeds $3,000 exclusive of interests and costs, yet such averments are not controlling where the claim is a liquidated one and as a matter of law the recovery can not possibly equal the jurisdictional amount. *North American Transporta-*
[fol. 32] *tion & Trading Co.* v. *Morrison*, 178 U. S. 262, 267; *Colorado Life Company* v. *Steele*, 95 Fed. (2d) 535 (C. C. A. 8th).

The situation involved is analogous to that in which recovery is sought under an insurance policy which provides for installment payments of a stated amount at regular intervals over an indefinite period in the future, such payments being subject to termination upon the happening of conditions subsequent such as discontinuance of total disability or death of the beneficiary. Under such a policy a cause of action accrues as each disability payment becomes due. *Everhart* v. *State Life Insurance Co.*, — Fed. (2d) — (C. C. A. 6th), decided April 2, 1946; *Aetna Life Ins. Co.* v. *Moyer*, 113 Fed. (2d) 974, 981 (C. C. A. 3rd). See also *New York Life Ins. Co.* v. *Viglas*, 297 U. S. 672, 678, 680, in which the Supreme Court said that where an insurance policy is not repudiated by the insurer the damages resulting from a refusal to pay do not exceed the benefits then in default. The writer of this opinion discussed the question in *Button* v. *Mutual Life Insurance Company of New York*, 48 Fed. Supp. 168 (W. D. Ky.), to which reference is made for a review of the authorities. In the present case only eleven weeks had elapsed from the day of the accident on March 8, 1945, to the filing of the action on May 24, 1945. The benefits due and in default at that time, if liability

existed at all, together with the burial benefits totaled less than $350.00. It is also uncertain, depending upon future events, that the total recovery, assuming liability is established, will ever amount to $3,000.00. The remarriage of the widow coupled with the death of the younger child would terminate the payments before they totaled that amount.

Section 80, Title 28 U. S. C. A. provides that if it appears to the satisfaction of the District Court at any time after removal that the suit does not substantially involve a controversy properly within the jurisdiction of the District Court, the "District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." The choice on the part of the District Judge between dismissal of the action and remanding it to the state court is discussed by the Supreme Court in *Employers Reinsurance Corporation* v. *Bryant*, 299 U. S. 374, at pages 381-382, where the Court approved an order to remand in preference to an order of dismissal. It was there pointed out that where further steps were available in the state court to obtain jurisdiction over the defendant, which did not exist in the District Court, [fols. 33-36] justice required that the plaintiff be afforded that opportunity rather than be permanently barred from doing so by an order of dismissal by the District Court. In the present case the plaintiff may obtain jurisdiction over both defendants by further proceedings in the state court if the action is remanded, but she would be barred from doing so if the action is dismissed. See *City of Knoxville* v. *Southern Paving Const. Company*, 220 Fed. 236 (E. D. Tenn.). Where the district court has pending before it both a motion to remand and a motion to dismiss, and the motion to remand is well taken, it is the better practice to remand the action and permit the motion to dismiss to be ruled upon by the state court where the action was originally filed and from which it was improperly removed. See *Anderson* v. *Sharp*, 189 Fed. 247, 249 (W. D. Tex.); *Olds* v. *Brown Shoe Company*, 25 Fed. Supp. 880 (W. D. Mo.) & *Ransom* v. *Sipple Truck Lines*, 52 Fed. Supp. 521, 526 (N. D. Ia.).

The order of the District Court dismissing the action is reversed, and the action remanded to the District Court for further proceedings consistent with this opinion.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

PETITION TO REHEAR—Filed April 24, 1946.

Appellees, Aetna Casualty & Surety Company and J. A. Jones Construction Company, respectfully represent that they are aggrieved by the holding of the Court as indicated in its opinion filed herein April 17, 1946, and that said holding is erroneous in the particulars hereinafter pointed out.

[fol. 38] This is a Tennessee Workmen's Compensation suit wherein appellant, the widow of the deceased employee, seeks to recover the maximum of $18.00 per week until she has received benefits aggregating $5000.00, also burial expenses in the amount of $150.00. At the time the suit was filed, benefits in the amount of less than $500.00 were due, and the Court has held that the jurisdictional amount requisite to removal from the State Court to the District Court is not present.

1. The situation here presented is not analogous to that in which recovery is sought of disability benefits under an insurance policy which are payable in stated amounts over an indefinite period of time. In such a case, the only relief that can be decreed by the Court is a recovery of the installments due on the date the suit is instituted, and a separate cause of action accrues as each disability installment becomes due thereafter. There, the jurisdictional question is necessarily resolved by the amount of the installments accrued at the date of suit.

A suit under the Tennessee Workmen's Compensation Act by a dependent of a deceased employee is not that kind of a case.

Code Section 6885 provides in part as follows:

> "In case of a dispute over or failure to agree upon compensation under this chapter between the employer and employee or the dependents of the employee, either party may submit the entire matter for determination
> • • •"

[fol. 39] Code Section 6892 provides:

> "All amounts paid by employer and received by the employee or his dependents, by lump sum payment, shall be final, but the amount of any award payable periodically for more than six months may be modified as follows * * *."

Code Section 6893 provides:

> "Any time after the amount of an award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may (where death or the nature of the injury renders the amount of future payments certain), by leave of Court, be paid by the employer to any savings bank or trust company of this State, to be approved and designated by the Court, and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer * * *. Payments from said fund shall be made by the Trustee in the same amount and at the same time as are herein required of the employer until said fund and interest shall be exhausted * * *."

In other words, the Legislature has provided, in unmistakable language, that in a compensation suit the judgment or award shall determine the entire controversy and shall adjudge the liability of the employer and its insurer for both past and future installments.

This Court will take judicial notice of the construction which the Tennessee courts have placed upon this Act. It will know that every award in favor of the plaintiff in a death case recites that the plaintiff recovers sixty per cent of the average weekly wage for four hundred weeks, or until the maximum of $5000.00 is reached. This latter sum, then, is the "amount in controversy."

2. The present decision cannot be reconciled with Thompson v. Thompson, 226 U. S. 551, 57 L. Ed. 347; Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 98, 79 L. Ed. 219, and Schunk v. Moline, etc., Company, 147 U. S. 499, 37 L. Ed. 255.

In Thompson v. Thompson, supra, the Supreme Court of the District of Columbia made an award in favor of the [fol. 40] wife in a suit for maintenance, the award being payable $75.00 per month. The Court of Appeals of the District reversed, and the wife perfected an appeal to the Supreme Court. The question was there made that the required jurisdictional amount of $5000.00 was not present, since that amount had not accrued. In upholding its jurisdiction, the Court said:

> "The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."
>
> Thompson v. Thompson, supra, p. 560.

The Pinkston case, supra, is directly in point and covers every issue upon which this Court has predicated its decision. In that case, the plaintiff, the widow of a deceased member of defendant Brotherhood, was entitled to receive a pension of $30.00 per month during her life, except that in the event of her remarriage, the pension was to cease. The Brotherhood became financially involved, and determined to abolish its Pension Department and to make a lump sum settlement of not to exceed $1500.00 with each widow on its pension rolls. Plaintiff brought suit in the Federal District Court to protect her rights. That Court held that the requisite jurisdictional amount was not present. In upholding jurisdiction, Mr. Justice Sutherland said:

> "The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.
>
> "This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to [fol. 41] preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.
>
> "In the Thompson Case, a decree had been entered by the Supreme Court of the District of Columbia in

favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the installments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560): 'The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.'

"The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension installments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the Thompson Case was fixed by decree, and subject to substantially like conditions subsequent. In the Thompson [fol. 42] Case the payments were subject to be cut off entirely, not only by death but, the court said, 'In the event of a change in the circumstances of the parties.' The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other."

Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, supra.

In the Schunk Case, supra, the plaintiff, under a Nebraska Statute, sued upon a series of promissory notes, of which only $530.09 were past due, together with the further sum of $1664.04 to become due in the future, and sought an attachment upon the ground that the defendant was about to fraudulently convey his property. Suit was commenced in the United States Court upon the ground of diversity of citizenship, and the jurisdiction of that Court was challenged because the required jurisdictional amount was not present. In upholding jurisdiction, the Court said:

> "It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by the demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute."
>
> Schunk v. Moline, etc., Company, supra, p. 504.

[fol. 43] The Schunk case is analogous to the case at bar, in that a statute authorized a judicial determination of the liability of the defendant in advance of the maturity of plaintiff's claim. The value of the unmatured part of the claim was taken into consideration in determining the question of jurisdiction. The Tennessee Workmen's Compensation Act has exactly the same effect.

3. A suit cannot be properly dismissed (and by the same token remanded to the State Court) on the ground that the subject matter is of less value than the jurisdictional amount, unless the facts made to appear on the record create a legal certainty of that conclusion.

Wetmore v. Rymer, 169 U. S. 115, 42 L. Ed. 682.

There are at least fifty Workmen's Compensation cases now pending upon the dockets of the Federal Courts in the Eastern District of Tennessee. They have been removed to those Courts upon the faith of the uniform construction of the Workmen's Compensation Act by the

Tennessee Courts to the effect that a suit under that Act adjudges the liability of the employer for future, as well as past, due installments, and upon the faith of the decisions of the Supreme Court of the United States herein cited. This Court has reviewed several such suits on their merits. The decision in the present case is a radical departure from long standing principles, and is without precedent.

We earnestly insist that the judgment of the District Court should be affirmed.

Respectfully submitted, Clyde W. Key, Counsel for Appellees.

[fol. 44] CERTIFICATE

The Aetna Casualty & Surety Company and J. A. Jones Construction Company, appellees herein, by their attorney, hereby certify that in their judgment and in the judgment of said attorney, the foregoing petition for rehearing is well founded and is not interposed for delay.

Clyde W. Key, Counsel for Appellees.

(All emphasis in quotations is ours.)

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Filed June 17, 1946

Appellees' petition for rehearing having been considered by the Court, and

The Court being of the opinion that the decision of the Supreme Court in Wright v. Mutual Life Insurance Company, 19 Fed. (2) 117; affirmed 276 U. S. 602, is more applicable to the facts of this case than are the decisions relied upon and referred to by the appellees, and since no lump sum payment as authorized by Section 6893 of the Tennessee Code has been agreed upon or adjudged in this controversy and accordingly is not involved herein,

It is ordered that appellees' Petition for Rehearing be and is now overruled.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 432

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8114)

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND
J. A. JONES CONSTRUCTION COMPANY,
Petitioners,

vs.

MRS. FANNIE M. FLOWERS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CLYDE W. KEY,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND J. A. JONES CONSTRUCTION COMPANY,

Petitioners,

vs.

MRS. FANNIE M. FLOWERS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Aetna Casualty & Surety Company and J. A. Jones Construction Company respectfully show:

That they are greatly aggrieved by the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in this cause on April 17, 1946 (Petition for rehearing denied June 17, 1946), by which said Circuit Court of Appeals ordered this cause remanded to the State

Court for trial, and that said judgment is erroneous in the particulars hereinafter pointed out.

I

Summary Statement of Matters Involved

This suit originated in the Chancery Court of Hawkins County, Tennessee. Respondent, suing in behalf of herself and her minor children, seeks a recovery under the Tennessee Workmen's Compensation Act, for the death of her husband. If her husband's death is compensable, she would be entitled to recover the maximum of $5000.00, though less than $3000.00 had accrued at the time suit was instituted. Alleging diversity of citizenship, petitioners removed the case to the United States District Court, where it was dismissed on a question of venue. Respondent appealed to the United States Circuit Court of Appeals, and that Court held that the "matter in controversy" did not exceed $3000.00, and therefore the District Court was without jurisdiction. Since the maximum rate of compensation is $18.00 per week, and since suit must be filed within one year, the effect of the holding is that the Federal District Court can never acquire jurisdiction of a Tennessee Workmen's Compensation suit.

II

Jurisdiction

The jurisdiction of this Court is invoked under the Acts of March 3, 1891, c. 517, sec. 6, 26 Stat., 824; March 3, 1911, c. 231, sec. 240, 36 Stat., 1157; Feb. 13, 1925, c. 229, sec. 1, 43 Stat., 938. (28 U. S. C., Sec. 347.) Jurisdiction of this Court to review upon certiorari a judgment of the Circuit Court of Appeals ordering a remand to the State Court was upheld in *Gay* v. *Ruff*, 292 U. S. 25.

III

The Question Presented

The sole question involved is this: In view of the requirement of 28 U. S. C. 71, that, in order to be removable, a cause must involve in excess of $3000.00, and in the light of the uniform construction placed upon the Tennessee Workmen's Compensation Act by the Court of last resort of Tennessee that only one suit shall be necessary to adjudicate the *entire* rights and liabilities of the parties, is a suit under the Act removable where the ultimate liability exceeds $3000.00, but the installments accrued at the time of institution of the suit are less than that amount?

IV

Reasons Relied On For the Allowance of the Writ

1. The decision sought to be reviewed is in conflict with the decisions of this Court with respect to the jurisdiction of the United States Courts, in the cases of *Thompson* v. *Thompson,* 226 U. S. 551; *Brotherhood of Locomotive Firemen & Enginemen* v. *Pinkerton,* 293 U. S. 98, and *Schunk* v. *Moline, etc., Company,* 147 U. S. 499.

2. Numerous Workmen's Compensation cases are now pending in the Federal District Courts in Tennessee, some originally instituted therein and some removed thereto. These Courts have uniformly taken jurisdiction of these cases since the adoption of the Workmen's Compensation Act in 1919. It is important to the orderly administration of justice that the question of the jurisdiction of these Courts over such suits be settled by this Court.

3. The construction placed by the Circuit Court of Appeals upon the Tennessee Workmen's Compensation Act is

in conflict with the decisions of the Supreme Court of Tennessee.

V

Prayer

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and transmit to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Sixth Circuit had in the cause numbered and entitled on its Docket, No. 10200, *Mrs. Fannie M. Flowers, Appellant,* v. *Aetna Casualty & Surety Company, et al., Appellees,* to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and that petitioners may have such further relief as to this Court may seem proper.

AETNA CASUALTY & SURETY COMPANY,
J. A. JONES CONSTRUCTION COMPANY,
By CLYDE W. KEY,
Their Attorney.

CLYDE W. KEY,
1408 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND J. A. JONES CONSTRUCTION COMPANY,

Petitioners.

vs.

MRS. FANNIE M. FLOWERS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The only published opinion of the Courts below is that of the United States Circuit Court of Appeals for the Sixth Circuit, found at *154 Federal (2d), 881.*

II

Jurisdiction

The date of the decision of the United States Circuit Court of Appeals for the Sixth Circuit, sought to be reviewed, is

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NOTE: All emphasizing type in this brief is ours, unless otherwise indicated.

April 17, 1946 (R. 19). A petition to rehear was seasonably filed (R. 37), and was denied June 17, 1946, and the petition for writ of certiorari has been filed within the time provided by statute.

The statutory provision which is believed to sustain the jurisdiction of this Court is *28 U. S. C., Section 347.*

The decision sought to be reviewed orders a remand to the State Court of a suit theretofore removed by the defendants to the United States District Court on account of diversity of citizenship, and in *Gay* v. *Ruff*, 292 U. S. 25, this Court held such a decision to be reviewable by this Court upon writ of certiorari.

III

Statement of the Case

This suit was commenced May 24, 1945, by the filing by respondent of a petition in the Chancery Court of Hawkins County, Tennessee, seeking to recover under the Tennessee Workmen's Compensation Act for the death of her husband, the defendants being the husband's employer and its Workmen's Compensation Insurance carrier. The petition sought a recovery in behalf of respondent and her minor children of "the maximum sum allowed under the law, which sum is less than 60% of his weekly average wages, and that she recover the burial expenses in the sum fixed under the statute * * *" (R. 4).

The petition alleged "that 60% of his average weekly wages over the statutory period of payment is in excess of $5000.00 which she is permitted to recover, and for this reason she sues in her own right and on behalf of her said minor children for said sum, together with the statutory burial fund allowed" (R. 3).

Petitioners in due season filed their petition for the removal of the suit to the United States District Court,

alleging that they are foreign corporations, and that the amount in controversy exceeded $3000.00 (R. 8-9). Removal was ordered by the State Court (R. 9).

In the District Court petitioners filed a motion to dismiss for improper venue (R. 10), which motion was sustained (R. 12, 13).

Respondent perfected an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and that Court reversed the judgment of the District Court and ordered the cause remanded to the State Court upon the sole ground that the amount in controversy did not exceed $3000.00, and that on this account the District Court lacked jurisdiction.

IV

Specification of Errors

The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the District Court lacked jurisdiction of this cause, and that this cause had been improperly removed thereto, this holding being erroneously predicated upon the ground that the requisite jurisdictional amount was not involved.

V

ARGUMENT

Summary of Argument

Point One: Under the uniform construction of the Tennessee Workmen's Compensation Act, by all of the Courts of the State, there are *involved* in a suit under the Act not only the installments of compensation which have accrued at the time of the filing of the suit, but also all installments that might thereafter accrue. A judgment in favor of a claimant invariably embraces both past due and future

installments. Therefore, both must be taken into consideration in determining the jurisdictional amount.

Tennessee Code Sections 6885, 6890, 6891, 6893;
Southern Railway Company v. *Grigsby*, 155 Tenn. 285, 292 S. W. 3;
Central Franklin Process Company v. *Gann*, 175 Tenn. 267, 133 S. W. (2d) 503;
Diamond Coal Mining Co. v. *Curnutt*, 179 Tenn. 278, 165 S. W. (2d) 575;
Riley v. *Knoxville Iron Company*, 178 Tenn. 107, 156 S. W. (2d) 398.

Point Two: The decision here sought to be reviewed is in conflict with former decisions of this Court.

Thompson v. *Thompson*, 226 U. S. 551;
Brotherhood of Locomotive Firemen & Enginemen v. *Pinkston*, 293 U. S. 98;
Schunk v. *Moline, etc., Company*, 147 U. S. 499;
Wetmore v. *Rymer*, 169 U. S. 115.

Point One

The Workmen's Compensation Act of Tennessee was adopted in 1919. Unlike most such Acts, it is administered by the Courts rather than by an Administrative Commission.

Section 6885 of the Code of Tennessee regulates the procedure. This section, which is reproduced in the Appendix, provides in substance that in case of a dispute over or failure to agree upon compensation, either the employer or the claimant "*may submit the entire matter for determination to the Judge* . . . *and such Judge* . . . *is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts of record render and enforce judgments.*"

Section 6890 of the Code provides that, with the consent of the Circuit Court, the amounts of compensation payable periodically may be commuted to one or more lump-sum payments.

Section 6891 of the Code provides in substance that where the amount "paid or to be paid in settlement *or by award* does not exceed the compensation for six months' disability," the award shall be final and not subject to readjustment.

Section 6893 of the Code provides in part as follows:

> "Any time after the amount of any award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may * * * be paid by the employer to any savings bank or trust company of this State * * * and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer."

In applying these provisions of the Act, all of the Courts of Tennessee, including the Court of last resort, have construed the language of Code Section 6885 to the effect that the parties "may submit the *entire matter* for determination", as conferring jurisdiction upon the courts to adjudge in one single suit the entire and ultimate rights and liabilities of the parties. Invariably the judgment embraces both past due and future installments of compensation.

This fact is illustrated by the case of *Central Franklin Process Company* v. *Gann*, 175 Tenn. 267. In that case the trial Court made an award of compensation in favor of a disabled employee. This award was affirmed by the Supreme Court of Tennessee. That Court described the judgment it was affirming in this language:

> "It was further held that petitioner was permanently and totally disabled within the meaning of the Compen-

sation Act, and she was awarded compensation at the rate of $6.58 for four hundred weeks, and at $5.00 per week for an additional one hundred and fifty weeks, this recovery to be credited by the payments theretofore made."

Central Franklin Process Co. v. *Gann, supra*, p. 276.

We have picked at random three Workmen's Compensation cases decided by the Supreme Court of Tennessee in favor of the claimant, and to illustrate the form of the judgments entered in these cases by the Court, we quote excerpts from these judgments.

In Southern Railway Company v. *Grigsby* (1927), 155 Tenn. 285, where there was an award in favor of the employee's widow, the minute entry (Supreme Court Minute Book 1926, page 181) provides:

"It is further ordered and decreed that the plaintiff, Daisy L. Grigsby, for the use of herself and her said minor children, is lawfully entitled to collect from the defendant Southern Railway Company the further sum of $11.00 per week for the period of 122 weeks from and after March 30, 1927, these payments to be made on the 1st and 15th of each calendar month, provided that during said period she, the said Daisy L. Grigsby, shall live and remain unmarried * * *."

In *Riley* v. *Knoxville Iron Company* (1941), 178 Tenn. 107 (Minute Book 1942, page 85), the minute entry provides:

"It is further ordered, adjudged and decreed by the Court that appellant * * * have and recover from said appellees * * * the sum of $5.00 per week from May 26, 1940, during his dependency, not exceeding 400 weeks * * *."

In *Diamond Coal Mining Company* v. *Carnutt*, 179 Tenn. 278, the minute entry (Minute Book 1942, page 67) provides:

"It is further the judgment of the Court that Fannie C. Carnutt have and recover 8⅓% of the average

weekly wages of William Curnutt for a period of 400 weeks, being from the date of his death, May 22, 1941, and subject to termination as provided in said law, and for the purpose of such payments this case is remanded to the Circuit Court of Anderson County to the end that the payments be made at the end of each month into the hands of the Clerk of said Court."

Since the "amount in controversy" is the amount for which the Court *may* render judgment, and since the Courts of Tennessee have uniformly construed the statute in question as authorizing the rendition of judgment for both past due and future installments of compensation, it seems clear that such construction is binding upon the Federal Courts, and that both amounts must be considered in determining whether the Federal Courts have jurisdiction.

Point Two

In *Wetmore* v. *Rymer*, 169 U. S. 115, it was held that a suit cannot be properly dismissed on the ground that the subject matter is of less value than the jurisdictional amount, "unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the Statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said Circuit Court.'"

In the *Thompson* case, *supra*, the Supreme Court of the District of Columbia made an award in favor of the wife in a suit for maintenance, the award being payable $75.00 per month. The Court of Appeals of the District reversed, and the wife perfected an appeal to this Court. The question was there made that the required jurisdictional amount of $5000.00 was not present, since that amount had not yet accrued. In upholding its jurisdiction, the Court said:

"The present appeal is based upon Section 8 of the Act of February 9, 1893, to establish a Court of Ap-

peals for the District of Columbia * * * which section gives a writ of error or appeal to review in this Court any final judgment or decree of the Court of Appeals 'in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars'. Appellee challenges our jurisdiction on the ground that the matter here in dispute does not exceed the sum mentioned.

"Under the decree of the Supreme Court the payments of $75.00 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance.

"It is true that the obligation to make such payments for maintenance in the future, even when fixed by judicial decree, is not in the nature of a technical debt.

* * * * * * *

"The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time, or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband. (Citing cases.)

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.

"The statute conferring jurisdiction on this Court, while requiring that the matter in dispute shall exceed $5,000.00, does not require that it shall be of such a

nature as to constitute (if the event be favorable) a technical debt of record."
Thompson v. *Thompson*, 226 U. S. 551, 558.

The *Pinkston* case, *supra*, is directly in point and covers every issue upon which this Court has predicated its decision. In that case, the plaintiff, the widow of a deceased member of defendant Brotherhood, was entitled to receive a pension of $30.00 per month during her life, except that in the event of her remarriage, the pension was to cease. The Brotherhood became financially involved, and determined to abolish its Pension Department and to make a lump sum settlement of not to exceed $1500.00 with each widow on its pension rolls. Plaintiff brought suit in the Federal District Court to protect her rights. That Court held that the requisite jurisdictional amount was not present. In upholding jurisdiction, Mr. Justice Sutherland said:

"The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

"This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

"In the Thompson case, a decree had been entered by the Supreme Court of the District of Columbia in favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not in-

volved, as the statute at that time required. While the installments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560): 'The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.'

"The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension installments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. *The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her.* Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent. In the *Thompson* case the payments were subject to be cut off entirely, not only by death but, the court said, 'In the event of a change in the circumstances of the parties.' The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other."

Brotherhood of Locomotive Firemen & Enginemen v. *Pinkston*, 293 U. S. 98, 99.

In the *Schunk* case, *supra*, the plaintiff, under a Nebraska Statute, sued upon a series of promissory notes, of which

only $530.09 were past due, together with the further sum of $1664.04 to become due in the future, and sought an attachment upon the ground that the defendant was about to fraudulently convey his property. Suit was commenced in the United State Court upon the ground of diversity of citizenship, and the jurisdiction of that Court was challenged because the required jurisdictional amount was not present. In upholding jurisdiction, the Court said:

> "It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute."
>
> *Schunk* v. *Moline, etc., Company*, 147 U. S. 499, 504.

The *Schunk* case is analogous to the case at bar, in that a statute authorized a judicial determination of the liability of the defendant *in advance of the maturity of plaintiff's claim*. The value of the unmatured part of the claim was taken into consideration in determining the question of jurisdiction. The Tennessee Workmen's Compensation Act has exactly the same effect.

The Circuit Court of Appeals predicated its decision upon the line of life insurance cases, like *Wright* v. *Mutual Life Insurance Company*, 19 Fed. (2d) 117, affirmed 276 U. S. 602, wherein it was held that in a suit to recover past due installments due under a life insurance policy, the fact

that the judgment would have the *collateral effect* of estopping the defendant to deny liability for future installments was not sufficient to justify inclusion of the future installments in making up the required jurisdictional amount. These authorities are not applicable for the reason, as already pointed out, that the effect of a judgment in a Tennessee Workmen's Compensation suit upon future installments is not a *collateral* effect. The judgment itself awards a recovery for future installments, and that judgment is absolutely final, with the sole exception that it may be modified in the event of changed conditions, just as in the *Thompson* case, *supra*.

If the decision under consideration is permitted to stand, then the Federal District Courts can never acquire jurisdiction of a Tennessee Workmen's Compensation suit. The maximum weekly installment recoverable is $18.00. Section 6884 of the Code of Tennessee requires the suit to be brought within one year from the date of injury, and $3000.00 of benefits cannot accrue within that year. This demonstrates the importance of an authoritative determination of this question of jurisdiction.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by the granting of a writ of certiorari, and thereafter reviewing and reversing the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

CLYDE W. KEY,
1408 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioners.

APPENDIX

Tennessee Code Section 6885—In case of a dispute over or failure to agree upon compensation under this chapter between the employer and employee or the dependents of the employee, either party may submit the entire matter for determination to the Judge or Chairman of the County Court in which the accident occurred, and such Judge or Chairman is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts of record render and enforce judgment. The County Judge or Chairman shall have the power to subpoena witnesses, administer oaths and punish witnesses for contempt; and, in short, he shall have such powers in conducting hearings under this chapter as are possessed by the Judges of the Circuit Courts as courts of general jurisdiction. Officers serving process, subpoenas and other papers shall have the same fees now provided by law for such officers in the Magistrates' Courts.

The party invoking the power of said Court shall file a petition setting out the facts on which the claim is based under this chapter. Upon said petition being filed, the Clerk of the County Court shall issue and cause to be served on the defendant named in said petition a summons accompanied by a certified copy of the petition, commanding the defendant to appear and make defense to said petition before the Judge or Chairman of said County Court. Said summons shall be served on the defendant as in other civil cases at least ten days before the time the matter is to be heard. The County Judge or Chairman shall set claims for hearing not more than fifteen days after the filing of the petition unless for good cause shown. The defendant shall file an answer to said petition on or against the day specified in the summons, unless the Court grants further time in which to answer on good cause shown by affidavit. Should the defendant fail to answer the petition within the time prescribed, a judgment pro confesso will be entered against him, and the cause proceeded with ex parte. The Judge or Chairman trying the case shall hear

the evidence offered by either or both parties, and render judgment. Either party dissatisfied with the judgment of the Judge or Chairman may appeal as in other civil cases to the next term of the Circuit Court of the County, where the cause will be heard by the Circuit Judge de novo. The cause shall be heard by the Circuit Judge without a jury, and as other non-jury civil cases are heard in the Circuit Court. Neither party shall have the right to demand a jury. It shall be the duty of the County Judge or Chairman of the County Court, in carrying out the provisions of this chapter, to keep a docket of all claims presented to him for settlement or adjudication, and he shall cause to be entered on a separate minute book a final record of his findings and conclusions in litigated cases, as well as of orders, compromises or settlements made by him. * * * The party filing the petition may, at his option, instead of filing the same before the County Judge or Chairman, file the same as an original petition in either the Circuit, Criminal or Chancery Court of the County in which petitioner resides, or in which the alleged accident happens, in which event summons shall be issued by the Clerk of the Court in which the proceeding is instituted, and shall be returned before said Court within the time provided for proceedings before a County Judge or County Chairman. The issue shall be made in the same manner, and the presiding Judge shall proceed to hear the case as provided in case of appeal from the County Judge or Chairman. Whenever any matter is brought before the County Judge or Chairman, or before any Judge, as provided herein, the said County Judge or Chairman, or any Judge, may, if he so desires, visit the scene of the accident and examine the surroundings.

Any party to the proceedings in the Circuit, Criminal or Chancery Court may, if dissatisfied or aggrieved by the judgment or decree of that Court, pray an appeal in the nature of a writ of error to the Supreme Court, where the cause shall be heard and determined in accordance with the practice governing other appeals in the nature of a writ of error in civil causes.

The trial of all cases under this law shall be expedited by (a) giving all such cases priority over all other cases on the trial docket in the trial Court other than cases involving State revenue; (b) by allowing any case on appeal in the Supreme Court to be, on motion of either party, transferred to the Division where the Supreme Court is then or will next be in session.

Tennessee Code Section 6890—The amounts of compensation payable periodically hereunder may be commuted to one or more lump sum payments. These may be commuted only with the consent of the Circuit Court. In making such commutation, the lump sum payment shall, in the aggregate, amount to a sum equal to the present value of all future installments of compensation calculated on a six per cent basis. No settlement or compromise shall be made except on the terms herein provided.

Tennessee Code Section 6891—All settlements of compensation by agreement of the parties, and all awards of compensation made by the Court, where the amount paid or to be paid in settlement or by award does not exceed the compensation for six months' disability, shall be final and not subject to readjustment.

Tennessee Code Section 6893—Any time after the amount of any award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may (where death or the nature of the injury renders the amount of future payments certain) by leave of Court, be paid by the employer to any savings bank or trust company of this State, to be approved and designated by the Court, and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer. The payment of such sum by the employer, evidenced by the receipts in duplicate of the Trustee, one of which shall be filed with the Division of Workmen's Compensation, and the other filed with the Clerk of the Circuit Court, shall operate as a satisfaction

of said award as to the employer. Payments from said fund shall be made by the Trustee in the same amount and at the same time as are herein required of the employer until said fund (and) interest shall be exhausted. In the appointment of the Trustee, preference shall be given, in the discretion of the Court, to the choice of the injured employee or the dependent of the deceased employee, as the case may be.

NOTE: The above references are to the Code of Tennessee of 1932.

COPY.

Supreme Court, U. S.
FILED
JAN 13 1947
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 432.

AETNA CASUALTY & SURETY COMPANY and J. A. JONES CONSTRUCTION COMPANY, Petitioners, vs. MRS. FANNIE M. FLOWERS, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS.

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SUPREME COURT OF THE UNITED STATES.

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AETNA CASUALTY & SURETY COMPANY and J. A. JONES CONSTRUCTION COMPANY, Petitioners, vs. MRS. FANNIE M. FLOWERS, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS.

I.

OPINIONS OF COURT BELOW.

The only published opinion of the Court below is that of the United States Circuit Court of Appeals for the Sixth Circuit, found at **154 Federal (2) 881.**

II.

JURISDICTION.

The date of the decision of the United States Circuit Court of Appeals for the Sixth Circuit, sought to be reviewed, is April 17, 1946 (R. 19). A petition to rehear was seasonably filed (R. 24), and was denied June 17, 1946, and the petition for writ of certiorari was filed within the time provided by Statute.

The statutory provision believed to sustain the jurisdiction of this Court is 28 U. S. C. 347.

The decision sought to be reviewed orders a remand to the State Court of a suit theretofore removed by petitioners (the defendants therein) to the United States District Court on account of the diversity of citizenship, and in **Gay v. Ruff, 292 U. S. 25**, this Court held such a decision to be reviewable by this Court upon writ of certiorari. This Court granted the writ of certiorari on October 14, 1946 (R. 30).

III.

STATEMENT OF THE CASE.

This suit was commenced May 24, 1945, by the filing by respondent of a petition in the Chancery Court of Hawkins County, Tennessee, seeking to recover under the Tennessee Workmen's Compensation Act for the death of her husband, the defendants being the husband's employer and its insurer. The petition sought a recovery in behalf of respondent and her minor children of "the maximum sum allowed under the law, which sum is less than 60% of his average weekly wages, and that she recover the burial expenses in the sum fixed under the Statute * * * " (R. 4).

The petition alleged "that 60% of his average weekly wages over the statutory period of payment is in excess of $5000.00, which she is permitted to recover, and for this reason she sues in her own right and on behalf of her said minor children **for said sum**, together with the statutory burial fund allowed" (R. 3).

Petitioners in due season filed their petition for the removal of the suit to the United States District Court, alleging that they were foreign corporations, and that the amount in controversy exceeded $3000.00, exclusive of interest, penalties and costs (R. 8). Removal was ordered by the State Court (R. 9).

In the District Court petitioners filed a motion to dismiss for improper venue (R. 10), which motion was sustained (R. 12, 13). In the meantime, respondent had filed a motion to remand upon the grounds (a) that the suit was not one of a civil nature in law or equity, and hence not removable, (b) that the jurisdictional amount of $3000.00 was not involved, and (c) that notice of the filing of the petition for removal was not timely given (R. 11). Since

the motion to dismiss was sustained, the District Court pretermitted action upon the motion to remand.

Respondent perfected an appeal to the United States Circuit Court of Appeals, and that Court reversed the judgment of the District Court and ordered the case remanded to the State Court upon the sole ground that the amount in controversy did not exceed $3000.00, and that on this account the District Court lacked jurisdiction.

IV.

SPECIFICATION OF ERROR.

The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the District Court lacked jurisdiction of this case, and that the suit had been improperly removed thereto, this holding being erroneously predicated upon the ground that the requisite jurisdictional amount was not involved.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point One: Under the uniform construction of the Tennessee Workmen's Compensation Act, by all of the Courts of the State, the **"matter of controversy"** in a suit under the Act is not only the sum of the installments of compensation which have accrued at the time of the filing of the suit, but also all installments that might thereafter accrue. A judgment in favor of a claimant invariably embraces both past due and future installments. Therefore, both must be taken into consideration in determining whether there is present the jurisdictional amount necessary to give the United States District Courts jurisdiction.

Tennessee Code Sections 6885, 6890, 6891, 6893;
Southern Railway Company v. Grigsby, 155 Tenn. 285, 292 S. W. 3;
Central Franklin Process Company v. Gann, 175 Tenn. 267, 133 S. W. (2) 503;
Diamond Coal Mining Co. v. Curnutt, 179 Tenn. 278, 165 S. W. (2) 575;
Riley v. Knoxville Iron Company, 178 Tenn. 107, 156 S. W. (2) 398.

Point Two: Where the effect of the judgment upon defendants' liability for future accruing installments is not collateral only, but is determinative of defendants' liability, the sum of such future installments must be considered in determining whether or not the United States Courts have jurisdiction.

Thompson v. Thompson, 226 U. S. 551;
Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 98;

Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 499;
Wetmore v. Rymer, 169 U. S. 115.

Point Three: A suit to enforce a cause of action created solely by State Statute is nevertheless removable if the remedy and procedure prescribed by the Statute is substantially consistent with the ordinary modes of procedure in the United States Courts.

United States Constitution, Article III, Sec. 2;
Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123;
Ex parte McNeil, 13 Wall. 236, 243, 20 L. Ed. 624;
Railway Company v. Whitton, 13 Wall. 270, 286, 20 L. Ed. 571;
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Terrall v. Burke Construction Company, 257 U. S. 529, 66 L. Ed. 352.

Point Four: The notice of the petition for removal was timely.

28 U. S. C. 72;
Lee v. Insurance Company, 292 Fed. 408;
Miller v. Telephone Company, 279 Fed. 896;
Williams v. New York, etc., Railway Company, 11 Fed. (2) 363;
Cropsey v. Sun etc. Publishing Assn., 215 Fed. 132;
Potter v. General Baking Co., 213 Fed. 697.

PREFATORY STATEMENT.

This Court has granted the writ of certiorari to review an order of the United States Circuit Court of Appeals for the Sixth Circuit remanding this case to the State

Court, whence it was removed on the ground of diversity of citizenship. The remand was predicated upon the sole ground that the jurisdictional amount was not present. The questions raised by the petition for writ of certiorari are covered by **Point One** and **Point Two** of the foregoing "Summary of Argument", and we understand these are the only questions that will be considered here.

However, respondent in her brief in opposition to the petition for writ of certiorari has advanced additional grounds in support of the order of the Circuit Court of Appeals which were not ruled upon by that Court. These additional grounds are responded to in **"Point Three"** and **"Point Four"** of our "Summary of Argument."

POINT ONE.

The Workmen's Compensation Act of Tennessee was adopted in 1919. Unlike most such Acts, it is administered by the Courts rather than by an Administrative Commission.

Section 6885 of the Code of Tennessee regulates the procedure. This section, which is reproduced in the Appendix, provides in substance that in case of a dispute over or failure to agree upon compensation, either the employer or the claimant **"may submit the entire matter for determination to the Judge * * * and such Judge * * * is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts of record render and enforce judgments."**

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Section 6891 of the Code provides in substance that where the amount paid or to be paid in settlement or by award does not exceed the compensation for six months' disability," the award shall be final and not subject to readjustment.

Section 6893 of the Code provides in part as follows:

> "Any time after the amount of any award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may * * * be paid by the employer to any savings bank or trust company of this State * * * and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer."

In applying these provisions of the Act, all the Courts of Tennessee, including the Court of last resort, have construed the language of Code Section 6885 to the effect that the parties "may submit the **entire matter** for determination," as conferring jurisdiction upon the courts to adjudge in one single suit the entire and ultimate rights and liabilities of the parties. Invariably the judgment embraces both past due and future installments of compensation.

This fact is illustrated by the case of **Central Franklin Process Company v. Gann, 175 Tenn. 267.** In that case the trial Court made an award of compensation in favor of a disabled employee. This award was affirmed by the Supreme Court of Tennessee. That Court described the judgment it was affirming in this language:

> "It was further held that petitioner was permanently and totally disabled within the meaning of the Compensation Act, and she was awarded compensation at the rate of $6.58 for four hundred weeks, and

at $5.00 per week for an additional one hundred and fifty weeks, this recovery to be credited by the payments theretofore made."

Central Franklin Process Co. v. Gann, supra, p. 276.

We have picked at random three Workmen's Compensation cases decided by the Supreme Court of Tennessee in favor of the claimant, and to illustrate the form of the judgments entered in these cases by the Court, we quote excerpts from these judgments.

In **Southern Railway Company v. Grigsby (1927), 155 Tenn. 285**, where there was an award in favor of the employee's widow, the minute entry (Supreme Court Minute Book 1926, page 181) provides:

"It is further ordered and decreed that the plaintiff, Daisy L. Grigsby, for the use of herself and her said minor children, is lawfully entitled to collect from the defendant Southern Railway Company the further sum of $11.00 per week for the period of 122 weeks from and after March 30, 1927, these payments to be made on the 1st and 15th of each calendar month, provided that during said period she, the said Daisy L. Grigsby, shall live and remain unmarried * * *."

In **Riley v. Knoxville Iron Company (1941), 178 Tenn. 107 (Minute Book 1942, page 85)**, the minute entry provides:

"It is further ordered, adjudged and decreed by the Court that appellant * * * have and recover from said appellees * * * the sum of $5.00 per week from May 26, 1940, during his dependency, not exceeding 400 weeks * * *."

In **Diamond Coal Mining Company v. Curnutt, 179 Tenn. 278**, the minute entry (Minute Book 1942, page 67) provides:

"It is further the judgment of the Court that Fannie C. Curnutt have and recover 8⅓% of the average weekly wages of William Curnutt for a period of 400 weeks, being from the date of his death, May 22, 1941, and subject to termination as provided in said law, and for the purpose of such payments this case is remanded to the Circuit Court of Anderson County to the end that the payments be made at the end of each month into the hands of the Clerk of said Court."

Since the "amount in controversy" is the amount for which the Court **may** render judgment, and since the Courts of Tennessee have uniformly construed the statute in question as authorizing the rendition of judgment for both past due and future installments of compensation, it seems clear that such construction is binding upon the Federal Courts, and that both amounts must be considered in determining whether the Federal Courts have jurisdiction.

POINT TWO.

In **Wetmore v. Rymer, 169 U. S. 115**, it was held that a suit cannot be properly dismissed on the ground that the subject matter is of less value than the jurisdictional amount, "unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a logical certainty of the conclusion based on them. Nothing less than this is meant by the Statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said Circuit Court.'"

In the **Thompson case**, supra, the Supreme Court of the District of Columbia made an award in favor of the wife in a suit for maintenance, the award being payable $75.00 per month. The Court of Appeals of the District reversed, and the wife perfected an appeal to this Court. The ques-

tion was there made that the required jurisdictional amount of $5000.00 was not present, since that amount had not yet accrued. In upholding its jurisdiction, the Court said:

"The present appeal is based upon Section 8 of the Act of February 9, 1893, to establish a Court of Appeals for the District of Columbia * * * which section gives a writ of error or appeal to review in this Court any final judgment or decree if the Court of Appeals 'in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.' Appellee challenges our jurisdiction on the ground that the matter here in dispute does not exceed the sum mentioned.

"Under the decree of the Supreme Court the payments of $75.00 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance.

"It is true that the obligation to make such payments for maintenance in the future, even when fixed by judicial decree, is not in the nature of a technical debt.

* * * * * * *

"The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time, or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband. (Citing cases.)

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although

they are subject to be increased, decreased, or even cut off, as just indicated.

"The statute conferring jurisdiction on this Court, while requiring that the matter in dispute shall exceed $5,000.00, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record."

Thompson v. Thompson, 226 U. S. 551, 558.

The **Pinkston case**, supra, is directly in point and covers every issue upon which the Court of Appeals has predicated its decision. In that case, the plaintiff, the widow of a deceased member of defendant Brotherhood, was entitled to receive a pension of $30.00 per month during her life, except that in the event of her remarriage, the pension was to cease. The Brotherhood became financially involved, and determined to abolish its Pension Department and to make a lump sum settlement of not to exceed $1500.00 with each widow on its pension rolls. Plaintiff brought suit in the Federal District Court to protect her rights. That Court held that the requisite jurisdictional amount was not present. In upholding jurisdiction, Mr. Justice Sutherland said:

"The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

"This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

"In the Thompson case, a decree had been entered by the Supreme Court of the District of Columbia in

favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the installments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560): 'The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.'

"The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension installments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. **The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her.** Continuance of payments durings the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the **Thompson** case was fixed by decree, and subject to substantially like conditions subsequent. In the **Thompson** case the payments were subject to be cut off entirely, not only by death but, the court said, 'In the event of a change in the circumstances of the parties.' The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of

the specified event which would put an end to the obligation is no more uncertain in one case than in the other."

Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 98, 99.

In the **Schunk case**, supra, the plaintiff, under a Nebraska Statute, sued upon a series of promissory notes, of which only $530.09 were past due, together with the further sum of $1664.04 to become due in the future, and sought an attachment upon the ground that the defendant was about to fraudulently convey his property. Suit was commenced in the United States Court upon the ground of diversity of citizenship, and the jurisdiction of that Court was challenged because the required jurisdictional amount was not present. In upholding jurisdiction, the Court said:

> "It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute."

Schunk v. Moline, etc., Company, 147 U. S., 499, 504.

The **Schunk case** is analogous to the case at bar, in that a statute authorized a judicial determination of the liability of the defendant **in advance of the maturity of plaintiff's claim.** The value of the unmatured part of the claim was taken into consideration in determining the question

of jurisdiction. The Tennessee Workmen's Compensation Act has exactly the same effect.

The Circuit Court of Appeals predicated its decision upon the line of insurance cases, like **Wright v. Mutual Life Insurance Company, 19 Fed. (2d) 17, affirmed 276 U. S. 602,** wherein it was held that in a suit to recover past due installments due under a life insurance policy, the fact that the judgment would have the **collateral effect** of estopping the defendant to deny liability for future installments was not sufficient to justify inclusion of the future installments in making up the required jurisdictional amount. These authorities are not applicable for the reason, as already pointed out, that the effect of a judgment in a Tennessee Workmen's Compensation suit upon future installments is not a **collateral** effect. The judgment itself awards a recovery for future installments, and that judgment is absolutely final, with the sole exception that it may be modified in the event of changed conditions, just as in the **Thompson case,** supra.

If the decision under consideration is permitted to stand, then the Federal District Courts can never acquire jurisdiction of a Tennessee Workmen's Compensation suit. The maximum weekly installment recoverable is $18.00. Section 6884 of the Code of Tennessee requires the suit to be brought within one year from the date of injury, and $3000.00 of benefits cannot accrue within that year.

POINT THREE.

Article III, Section 2, of the Constitution of the United States provides that "The judicial power shall extend to all cases, in law and equity, * * * between citizens of different States * * *". Whether a suit filed in the State Court is removable to the United States Courts depends upon whether the United States Courts have original

jurisdiction thereof. The point here made by respondent is that a suit under the Tennessee Workmen's Compensation Act is not a case "in law and equity", and that petitioners have been required by the State Statute to waive or surrender their right of removal.

As before stated, the Tennessee Act is court-administered. The procedure in the trial Court, as well as in the Appellate Court, is governed in detail by Section 6885 of the Code of Tennessee. (See Appendix.) Briefly stated, the procedure is this: In the event of a disagreement between the injured employee or the dependents of a deceased employee and the employer or its insurer, either party may file a petition in the County, Circuit, Criminal or Chancery Court of the County in which the accident occurred. (They are all the nisi courts of record of Tennessee.) Process is issued requiring the defendant to appear and file answer. The case is then heard on oral testimony and a judgment is rendered by the Court. Either party dissatisfied with the judgment may appeal **"as in other civil cases,"** to the next term of the Circuit Court, if the suit originated in the County Court, otherwise to the Supreme Court of the State.

The procedure on appeal is identical with that of any other civil suit, with the exception that, while the Workmen's Compensation Act was adopted in 1919, the Legislature in 1925 created an intermediate appellate court. Section 10 of the Act creating this new Court provides that "The jurisdiction of the Court of Appeals shall be appellate only, and shall extend to all civil cases except those involving constitutional questions • • • Workmen's Compensation • • •".

Therefore, insofar as appellate procedure is concerned, Workmen's Compensation cases are placed in a group of

cases, including those involving constitutional questions, the right to hold public office, State revenue, mandamus, etc. In this group of cases the appeal lies direct to the Supreme Court, whereas in other civil cases the appeal is to the Court of Appeals or intermediate appellate court.

It is no bar to the jurisdiction of the United States Courts that the cause of action is founded on State Statute and did not exist at common law.

Clark v. Smith, 13 Pet. 195, 203, 10 L. Ed. 123;
Ex parte McNiel, 13 Wall. 236, 243, 20 L. Ed. 624;
Railway Company v. Whitton, 13 Wall. 270, 286, 20 L. Ed. 571;
Davis v. Gray, 16 Wall. 203, 20 L. Ed. 447;
Wehrman v. Conklin, 155 U. S. 314, 324, 39 L. Ed. 167;
Cowley v. Railway Company, 159 U. S. 569, 582, 40 L. Ed. 263;
Traction Company v. Mining Company, 196 U. S. 239, 253, 49 L. Ed. 462.

In **Clark v. Smith**, supra, the Court said:

> "The State Legislature • • • having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of procedure on the Chancery side of the Federal Courts, no reason exists why it should not be pursued in the same form as it is in the State Courts."
>
> **Clark v. Smith**, supra, 203.

The case of **Traction Company v. Mining Company**, supra, was filed in the State Court under the Eminent Domain Statute of the State of Kentucky, and was removed to the United States Court on the ground of diversity of citizenship. In upholding the jurisdiction of the United States Court, Mr. Justice Harlan used this language:

"The rule is now settled that, under the judiciary act of 1887, 1888 (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508) a suit cannot be removed from a state court unless it could have been brought originally in the circuit court of the United States. (Citing cases.)

"Why could not the proceeding instituted in the county court have been brought originally in the Federal court? The case, as made in the county court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the circuit court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the 'judicial power shall extend * * * to controversies * * * between citizens of different states,' as well as by the Act of 1887 (Sec. 1), which declares 'that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, * * * in which there shall be a controversy between citizens of different states.' In view of these explicit provisions it is clear that the proceeding in the county court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so.

"Referring to the clause of the Constitution defining the judicial power of the United States, Chief Justice Marshall, speaking for the Court in Osborn v. Bank of the United States, 9 Wheat. 738, 819, 6 L. Ed. 204, 223, said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United

States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.'

"In Kohl v. United States, 91 U. S. 367, 376, 23 L. Ed. 449, 452, which was a suit in the Circuit Court of the United States to condemn lands for a public building, this Court, speaking by Mr. Justice Strong, said: 'It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right.'

"Two cases very much in point are Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, and Searl v. School Dist. No. 2, 124 U. S. 197, 31 L. Ed. 415, 8 Sup. Ct. Rep. 460.

"Mississippi & R. River Boom Co. v. Patterson was a case of condemnation under a statute authorizing a county district court to appoint commissioners to appraise the value of the property to be taken. The local statute provided that if the appraisement was not satisfactory, the matter could be brought before the court, where the issues of fact would be tried by a jury, unless a jury was waived. It was a case of diverse citizenship, and, upon the petition of the defendant, a citizen of another state, it was removed from the inferior local court to the circuit court of the United States. One question was whether the case was, in its nature, excluded from the jurisdiction of the Federal court. Referring to the contention that the proceeding to take private property for public use was an exercise by the State of its sovereign right of eminent domain, and with its exercise the United

States, a separate sovereignty, had no right to interfere by any of its departments, this court, speaking by Mr. Justice Field, said: 'But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding **before the courts** between parties,—the owners of the land on the one side and the company seeking the appropriation on the other,—**there is a controversy which is subject to the ordinary incidents of a civil suit**, and its determination derogates in no respect from the sovereignty of the state.' Again, in the same case: 'It has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the state under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different states. * * *

* * * * * * *

"We cannot doubt, in view of the authorities, that the case presented in the county court was a 'suit' or 'controversy between citizens of different states,' within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its Constitution (Ky. Const., Sec. 140); and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

Traction Company v. Mining Company, supra.

That the remedy prescribed by the Tennessee Workmen's Compensation Act is "substantially consistent with the ordinary modes of proceeding" in non-jury cases in the Federal Court is demonstrated by the fact that the

United States District Courts have encountered no difficulty in disposing of the numerous Tennessee Workmen's Compensation cases filed therein or removed thereto, at least one of which found its way to this Court (**Southern Extract Company v. Green, 103 Federal [2d] 232, 308 U. S. 568**).

The position of respondent that petitioners, by coming into Tennessee and accepting the benefits of its Workmen's Compensation Law, have waived their right of removal is without merit. The case of **Terrall v. Burke Construction Company, 257 U. S. 529, 66 L. Ed. 352**, involved a Statute of the State of Arkansas, which provided in substance that if a domesticated foreign corporation shall, without the consent of the other party, remove any suit to the Federal Court, it shall be the duty of the Secretary of State to forthwith revoke its authority to do business in the State. In holding this Statute to be unconstitutional and void, the Court, speaking through Mr. Chief Justice Taft, said:

> "The cases in this court in which the conflict between the power of a state to exclude a foreign corporation from doing business within its borders, and the Federal constitutional right of such foreign corporation to resort to the Federal courts, has been considered, cannot be reconciled. • • •
>
> "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been

suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

Terrall v. Burke Construction Company, supra, pp. 532-3.

POINT FOUR.

The Removal Act does not prescribe the length of the notice to be given of the filing of the petition for removal. It simply prescribes that "Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same" (28 U. S. C. 72).

There is a difference of opinion as to the purpose of this notice. One line of authorities is that the purpose of the notice is to afford the opposite party an opportunity to appear and be heard **upon presentation of the petition to the State Court—not upon the mere filing of the petition with the Clerk of the State Court.**

Lee v. Insurance Company, 292 Fed. 408.

The other view is that the plaintiff has no right to be heard in the State Court upon an application for removal; that his only right to be heard is upon a motion in the Federal Court to remand, and that the purpose of the notice is simply to advise him that the right to remove has been exercised.

Miller v. Telephone Co., 279 Fed. 896.

That the latter is the true purpose of the notice is very strongly indicated by the case of **Chicago etc. Railway Company v. Roberts, 164 U. S. 704, 41 L. Ed. 1183.**

However, it is not necessary to here decide this question, for in the instant case the notice was received by counsel for respondent on May 29th, whereas the order of removal was made and entered on June 7th,—nine days later, and that certainly is timely notice.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed; that this Court should adjudge that this cause was removable, and properly removed, to the United States District Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Knoxville, Tennessee,
Counsel for Petitioners.

Note: All emphasis in quotations is ours.

APPENDIX.

Tennessee Code Section 6885—In case of a dispute over or failure to agree upon compensation under this chapter between the employer and employee or the dependents of the employee, either party may submit the entire matter for determination to the Judge or Chairman of the County Court in which the accident occurred, and such Judge or Chairman is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts of record render and enforce judgment. The County Judge or Chairman shall have the power to subpoena witnesses, administer oaths and punish witnesses for contempt; and, in short, he shall have such powers in conducting hearings under this chapter as are possessed by the Judges of the Circuit Courts as courts of general jurisdiction. Officers serving process, subpoenas and other papers shall have the same fees now provided by law for such offices in the Magistrates' Courts.

The party invoking the power of said Court shall file a petition setting out the facts on which the claim is based under this chapter. Upon said petition being filed, the Clerk of the County Court shall issue and cause to be served on the defendant named in said petition a summons accompanied by a certified copy of the petition, commanding the defendant to appear and make defense to said petition before the Judge or Chairman of said County Court. Said summons shall be served on the defendant as in other civil cases at least ten days before the time the matter is to be heard. The County Judge or Chairman shall set claims for hearing not more than fifteen days after the filing of the petition unless for good cause shown. The defendant shall file an answer to said petition on or against the day specified in the summons, unless the Court grants further time in which to answer on good cause shown by

affidavit. Should the defendant fail to answer the petition within the time prescribed, a judgment pro confesso will be entered against him, and the cause proceeded with ex parte. The Judge or Chairman trying the case shall hear the evidence offered by either or both parties, and render judgment. Either party dissatisfied with the judgment of the Judge or Chairman may appeal as in other civil cases to the next term of the Circuit Court of the County, where the cause will be heard by the Circuit Judge de novo. The cause shall be heard by the Circuit Judge without a jury, and as other non-jury civil cases are heard in the Circuit Court. Neither party shall have the right to demand a jury. It shall be the duty of the County Judge or Chairman of the County Court, in carrying out the provisions of this chapter, to keep a docket of all claims presented to him for settlement or adjudication, and he shall cause to be entered on a separate minute book a final record of his findings and conclusions in litigated cases, as well as of orders, compromises or settlements made by him. * * * The party filing the petition may, at his option, instead of filing the same before the County Judge or Chairman, file the same as an original petition in either the Circuit, Criminal or Chancery Court of the County in which petitioner resides, or in which the alleged accident happens, in which event summons shall be issued by the Clerk of the Court in which the proceeding is instituted, and shall be returned before said Court within the time provided for proceedings before a County Judge or County Chairman. The issue shall be made in the same manner, and the presiding Judge shall proceed to hear the case as provided in case of appeal from the County Judge or Chairman. Whenever any matter is brought before the County Judge or Chairman, or before any Judge, as provided herein, the said County Judge or Chairman, or any Judge, may, if he so desires, visit the scene of the accident and examine the surroundings.

Any party to the proceedings in the Circuit, Criminal or Chancery Court may, if dissatisfied or aggrieved by the judgment or decree of that Court, pray an appeal in the nature of a writ of error to the Supreme Court, where the cause shall be heard and determined in accordance with the practice governing other appeals in the nature of a writ of error in civil causes.

The trial of all cases under this law shall be expedited by (a) giving all such cases priority over all other cases on the trial docket in the trial Court other than cases involving State revenue; (b) by allowing any case on appeal in the Supreme Court to be, on motion of either party, transferred to the Division where the Supreme Court is then or will next be in session.

Tennessee Code Section 6890—The amounts of compensation payable periodically hereunder may be commuted to one or more lump sum payments. These may be commuted only with the consent of the Circuit Court. In making such commutation, the lump sum payment shall, in the aggregate, amount to a sum equal to the present value of all future installments of compensation calculated on a six per cent basis. No settlement or compromise shall be made except on the terms herein provided.

Tennessee Code Section 6891—All settlements of compensation by agreement of the parties, and all awards of compensation made by the Court, where the amount paid or to be paid in settlement or by award does not exceed the compensation for six months' disability, shall be final and not subject to readjustment.

Tennessee Code Section 6893—Any time after the amount of any award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may (where death or the nature of

the injury renders the amount of future payments certain) by leave of Court, be paid by the employer to any savings bank or trust company of this State, to be approved and designated by the Court, and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer. The payment of such sum by the employer, evidenced by the receipts in duplicate of the Trustee, one of which shall be filed with the Division of Workmen's Compensation, and the other filed with the Clerk of the Circuit Court, shall operate as a satisfaction of said award as to the employer. Payments from said fund shall be made by the Trustee in the same amount and at the same time as are herein required of the employer until said fund (and) interest shall be exhausted. In the appointment of the Trustee, preference shall be given, in the discretion of the Court, to the choice of the injured employee or the dependent of the deceased employee, as the case may be.

Note: The above references are to the Code of Tennessee of 1932.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND
J. A. JONES CONSTRUCTION COMPANY,
Petitioners,

vs.

MRS. FANNIE M. FLOWERS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FANNIE M. FLOWERS,
Pro Se.

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Loland v. *Northwestern Stevedore Co.*, 209 Fed. 626 8
Mitchell v. *Usilton*, 146 Tenn. 419, 242 S. W. 248 7
Moon v. *Pacific Mutual Life Ins. Co.*, 28 Fed. Supp. 199 5
Mutual Liability v. *Patrick*, 157 Tenn. 618, 11 S. W. (2d) 872 12
Oman v. *Delius*, 162 Tenn. 192, 35 S. W. (2d) 570 9
Pickwick-Greyhound Lines v. *Shattuck* (C. C. A. 10), 61 F. (2d) 485 2
Portin v. *Portin*, 149 Tenn. 530, 261 S. W. 362 6
Snooks v. *Industrial Comm. of Ill.*, 9 Fed. Supp. 26 7
Town of McMinnville v. *Curtis*, 157 Tenn. 6, 192 S. W. (2d) 998 14
Williams v. *Green Bay & W. R. Co.*, — U. S. —, 66 Sup. Ct. Rep. 284 14

STATUTES CITED

Tenn. Code of 1932:
Secs. 10499, 10547 8
Secs. 6852, 6885, 6898, 8640, 8643 and 8669, 8653
Secs. 6885, 6892 9, 10, 13
U. S. C. A., Title 28:
Secs. 41, 71 4
Sec. 112 15
Constitution of the State of Tennessee, Art. 11, Sec. 8 14
Federal Rules of Civil Procedure, Rule 6 (d), (e) 8
Supreme Court Rules, 38 sub sec. 5 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND J. A. JONES CONSTRUCTION COMPANY,

Petitioners,

vs.

MRS. FANNIE M. FLOWERS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Motion to Dismiss the Petition for Certiorari

Respondent moves the Court as follows:

1. To dismiss the Certiorari Petition because, in response to the mandate of the Circuit Court of Appeals (6th Circuit), the district court entered an order remanding the case to the state court which was executed, and the state redocketed and reasserted jurisdiction, the federal court exhausted its jurisdiction, and is without statutory authority to again remove the case into the federal court; said motion is supported by certified copy of the order on file in

the state court, here attached as Exhibit "A" in the Appendix of this brief.

2. Because since the opinion was handed down by the Circuit Court of Appeals the defendants, now petitioners, filed a plea in abatement in the state court as shown by Exhibit "B" in the Appendix; and later after the execution of the mandate and the redocketing in the state court, the defendants proceeded with the taking of depositions in the case in the state court by stipulating with counsel as shown by Exhibit "C" attached thereto in the Appendix. These steps were inconsistent with the retention of jurisdiction in the Federal Court and respondent can hardly be expected to practice in separate courts at the same time in one litigation.

3. Because there is no special or important reason of a general public interest why this Court should exercise its discretion and entertain a review of this case, for the purpose of construing a State Statute, upon a question of practice, with only a local application to only one state in the United States.

FANNIE M. FLOWERS,
Respondent.

Brief on Motion to Dismiss

Pickwick-Greyhound Lines v. *Shattuck* (C. C. A. 10) 61 Fed. (2d) 485; *Ausbrooks* v. *Teleg. Co.* (D. C.) 282 F. 733 (Sanford, J.) Simkins Federal Practice, Sec. 1133.

II

Reply Brief to Merits of Petition

The Circuit Court of Appeals sustained the third ground assigned in the motion made in the district court to remand to the state court, raising the question of the jurisdictional

amount, and pretermitted the other issues raised in the motion as well as the issue of venue. Respondent has filed no petition seeking a review of these pretermitted issues, but understand she can assert these grounds in this Court in support of the Court below, for so long as its decision is correct upon any ground it will not be disturbed. Following this practice the respondent answering the petitioner's assignment, then advances the grounds assigned in respondent's motion to remand, as additional support of the Circuit Court of Appeals' decision.

There is but one Specification of Error assigned which is that the Circuit Court of Appeals erred in holding that the District Court lacked jurisdiction of the cause and said cause was improperly removed.

Respondent is content to rely, in reply to this Specification, upon the opinions and citations therein, of the Circuit Court of Appeals in disposing of the appeal and motion to rehear (Opinion, Record pps. 19-23).

Opinion on Motion to Rehear, Record, p. 29

We feel the opinions and citations are exhaustive enough to fully develop the issue raised, and any further elaboration on our part would only add additional labor on the Court. However, petitioner has advanced some new matter in his supporting brief that will be noticed.

He cited certain entered judgments of Tennessee cases, picked at random as he states, as establishing the conclusion that the Supreme Court of Tennessee has construed the Tennessee Compensation Act, as authorizing a decree for the full amount due before maturity. We resolutely deny that his argument and conclusions are sound. The cited decrees were drawn by counsel and do not reflect a considered interpretation of the Act, and amount only to a declaration of the present and future right of recovery in the event any future right of recovery materializes.

He insists the legal question presented on this specification of error has never been directly or indirectly presented and passed upon by the Tennessee Supreme Court in the cases cited or in any other case. And in the absence of a direct adjudication of the question at issue by the State Supreme Court, inferences that might be drawn from decrees drafted by counsel will not be persuasive upon this Court.

And the citations of excerpts of disconnected sections of the Code are misleading, especially in dealing with the jurisdiction of three state courts, *i. e.*, Chancery, Circuit, and County Courts, the last named being a court of limited and statutory jurisdiction; all three of said courts entertaining under the Act, jurisdiction, but not identical jurisdiction. Some of these courts exercise certain jurisdiction the others can not. The citation to the disconnected sections of the Code are not in point because not dealing with the jurisdiction of the Chancery Court, which forum respondent selected as is her right under the statute.

The Circuit Court of Appeals construed this Tennessee Act correctly. The Act is local and there is no question of general importance presented requiring the attention of the Supreme Court of the United States to review its action under *Supreme Court Rules, 38, sub. sec. 5.*

And in additional support of the opinion of the Circuit Court of Appeals respondent relies upon the other grounds of motion to remand assigned in respondent's appeal but pretermitted by the Court, being four in number, and the first, second and fourth being pretermitted.

(1) This is not a removal suit, because not one of a civil nature in law or equity; and the Federal District Court has no original jurisdiction of the subject matter (U. S. Code, title 28, sec. 41; id. 71).

"Section 28 of Judicial Code, makes a radical change in the right of removal by confining it to those suits

that could have been originally brought in the Federal Courts, and in which four things are necessary: First: The suit has to be one of a civil nature in law or equity * * *."

Simkins Fed. Practice, sec. 1096

"The test of removability of a cause from a state to a federal court is whether the action could have been originally brought in the federal court."

Moon v. *Pacific Mutual Life Ins. Co.*, 28 Fed. Sup. 199.

The State Supreme Court has held: "These actions cannot be classified as in either tort or contract . . ."

Chambers v. *Sanford, etc.*, 154 Tenn. 134, 289 S. W. 533.

They are not founded upon equitable principles entitling plaintiff to recover upon a maxim in equity. Jurisdiction of this character of a case under English law came under the Ecclesiastic Courts which had jurisdiction of probates, divorce, guardian and wards, bastards, and the administration of pious gifts. The federal courts do not assume jurisdiction of cases arising under the English Ecclesiastic Courts since they are not of a civil nature in law or equity.

The Tennessee Supreme Court construes this statute as one to relieve society from the burden of dependency and it is primarily, if not solely, a poor law; analogous to a bastardy proceeding or the administration of a pious gift.

"'The Workmen's Compensation Act is not a statute of descent and distribution. It is intended to relieve society of the burden of caring for injured workmen or the dependents of deceased workmen, and to place that burden upon the industry employing the workman. In case of the workman's death the law makers were concerned for the care of his dependents, not about the devolution of the workman's property. The dependency of a claimant is the true basis of his right

to compensation rather than blood or marriage. Relationship is really only evidence of dependency.

Portin v. *Portin*, 149 Tenn. 580, 261 S. W. 362;
Franklin v. *Stone-Webster*, — Tenn. —, 191 S. W. (2) 431.

At common law no one had a cause of action against an employer for an accidental injury to an employee. And no one has such cause of action in this State to this day, but by an optional law creating a cause of action by agreement and adoption of the Compensation Act by the employer and employee; and the jurisdiction is cast upon the court by the agreement between the parties, as in statutory arbitration. The Legislature has no authority to confer jurisdiction upon the Federal Courts when they have no jurisdiction, nor can the parties by a voluntary agreement confer jurisdiction upon the Federal Courts.

> "The courts have generally construed the statute so as to give injured employees every benefit which it was reasonably intended to confer, the object of the statute being to prevent injured workmen from becoming public charges."
>
> *Griffith* v. *Goforth*, — Tenn. —, 195 S. W. (2) 33 at 37.

(2) The Act establishes a peculiar or special procedure in the state courts for determining the controversy contrary to the established procedure in an action of a civil nature at law or in equity, requiring the exercise of administrative powers and defining the courts to administer the law; the parties voluntarily agreed to the jurisdiction to these courts when none of whom had such jurisdiction under the law of the land, and by accepting the Act and working under it all the parties were entitled to its benefits and bound by its provisions.

". . . such statute is elective, and where the employee accepts the provisions of the statute, he accepts the remedies therein provided and is bound by them."

Mitchell v. *Usilton*, 146 Tenn. 419, 242 S. W. 248.

"Employer accepting the State Workmen's Compensation submitted to jurisdiction of the state court and could not invoke the jurisdiction of the federal court for diversity of citizenship.

"Employer having voluntarily brought himself within state court's jurisdiction in compensation proceedings, cannot invoke the jurisdiction of the federal court."

Elsas v. *Montgomery Ele. Co.*, 38 Fed. (2d) 303.

"Proceedings under Illinois Workmen's Compensation Law held not removable to the federal court."

Snooks v. *Industrial Comm. of Ill.*, 9 Fed. Sup. 26.

(4) The statutory notice of the intention to file a petition for removal required to be given prior to the filing of the petition was not given.

Defendants' attorney mailed the petition and notice to the Clerk and Master for filing May 28, 1945, and on the same mail a copy to plaintiff's attorney located at the same place. It was received in due course through the mails May 29, 1945, at 10:30 A. M. The notice stated that at 9:00 o'clock A. M. May 29, 1945 (at a time prior to receipt of the notice), or as soon thereafter as counsel can be heard he would present it to the Chancellor at Chambers in Clinton, Tennessee. It was presented at some unknown date and the order filed with the Clerk and Master for entry on June 5, 1945, as shown by the C. & M.'s notation thereon (Notice, Record p. 7).

Order of Removal, Record p. 9

Plaintiff's attorney had no legal notice prior to the filing of the petition, nor of the application for the removal at any time.

The statute conferring Chambers jurisdiction provides, in case the parties do not consent, "then the parties desiring such action shall give notice in the same manner as provided in the matter of motions to dissolve injunctions". Code of Tenn., sec. 10499.

Five days notice shall be given defendant or his counsel of application to dissolve injunctions at Chambers. Code of Tenn., sec. 10547.

In the absence of required notice the Chancellor has no jurisdiction to act at Chambers.

James County v. *Hamilton Co.*, 89 Tenn. 237, 14 S. W. 601.

The Federal rules require five days notice, and when served by mail three (3) additional days.

Fed. Rules of Civil Procedure, Rule 6 (d), (e).

"The statute (Jud. Code. sec. 29) requires notice of filing petition and bond for removal to be given prior to the filing of the same; . . . . The rule as to notice is mandatory."

Simkins Federal Practice, 3rd Ed., sec. 1034;
Arthur v. *Maryland Casualty Co.*, 216 Fed. 386;
Loland v. *N. W. Stevedore Co.*, 209 Fed. 626.

"Notice of intent to file the petition and bond is imperative; if notice is not given, the case should be remanded."

Simkins Federal Practice, 3rd Ed., sec. 1034;
Arthur v. *Maryland Casualty Co.*, 216 Fed. 386;
Frazier v. *Hines*, 260 Fed. 874;
Cropsey v. *Sun P. & Pub. Co.*, 215 Fed. 133.

BRIEF ON QUESTION OF VENUE

In the event this Court is of the opinion that the Federal Court does have jurisdiction of this issue in litigation, that the Circuit Court of Appeals was in error in holding the jurisdictional amount not present, and that respondent's additional insistences are without merit, then respondent respectfully submits that the District Judge was in error in dismissing the complaint for lack of venue of the person and that this Court should take proper steps to correct the same, whether by its own opinion or by remanding to the Circuit Court of Appeals.

1. The plaintiff, now respondent, can and does admit the truth of the allegations of the motion, that the defendant J. A. Jones Construction Company was not doing business in Hawkins County where the suit was instituted and it maintained no office or agency there upon whom to serve process. However, the motion was silent as to the status of the co-defendant Aetna Casualty and Surety Company and the bill alleges that this co-defendant did business and maintained an office and/or agency in Hawkins County, and process was served upon this agent. The bill prayed for a counter-part summons to Knox County for service upon the officer or agent of the Construction Company, which was had.

The pleading—motion—raised only the question as to the venue of the defendant Construction Company and was silent as to the other defendant, but asked that both defendants be dismissed.

This action is transitory (*Chambers* v. *Sanford, etc.*, 154 Tenn. 134, 289 S. W. 533) and the cause of action is against both defendants for a liability that is several and joint. (Code sec. 6852(a); *Oman* v. *Delius*, 162 Tenn. 192, 35 S. W. (2d) 570; Code sec. 6898.) And the compensation statutes

expressly provide: "Said summons shall be served on the defendant as in other civil cases. . . ." (Code sec. 6885). Plaintiff followed the indicated course and served process upon a material defendant in Hawkins County with a counter-part summons to the resident county of the other defendant.

The act also provides as to venue as follows: "The party filing the petition may, at his option, . . . file the same as an original petition in either circuit, criminal, or chancery court of the *county in which petitioner resides* or in which the alleged accident happened . . ." (Code sec. 6885).

The State Supreme Court in construing this section as to venue held: "The territorial jurisdiction must be controlled by the laws which generally regulate venue. The provisions of the act touching venue, authorizing a suit in the county in which petitioner resides or in which the alleged accident happens are not exclusive" (*Chambers* v. *Sanford, etc.*, 154 Tenn. 134, 289 S. W. 533). In other words the court held that a material defendant must have an agent in the county where the accident happened or the petitioner resides in order to bring the defendant before the court, as required under the general law.

The general law referred to is codified in Code secs. 8640, 8643, and 8669; 8653. And these sections were analyzed by Judge Carothers in his classic book on practice, "History of a Lawsuit", 4th Ed. page 51, as follows:

> "As to pure transitory actions the person of the corporation is split into as many places as the corporation has offices, agencies, and directories; and such actions, for any cause arising out of the business of the corporation, may be brought in any county where the corporation has an office, agency, or resident director. And this is so whether the cause of action arose out of business conducted by the local office, agency, or di-

rector, or out of business of the corporation in the particular county where the suit is brought or not . . .

"The plaintiff may wish to sue several persons as defendants in the same suit, and they may not all reside in the same county in which he proposes to bring his action. In that case he is entitled to have an *original* summons issued to the county of the venue for such defendants as may reside or be found there and *counter-part* summons to any counties in the State where he supposes the other defendants may be found . . ."

The case relied upon by the defendants in support of their motion and which they insist makes the above holdings inapplicable is *Brown* v. *Stone and Webster*, 181 Tenn. 293, 181 S. W. (2d) 148, but we respectfully submit this case is in no way in conflict with the cited authority and strongly reaffirms the holding. In the case relied upon by the defendants there was no one residing in the county of the petitioner's residence representing a material defendant upon whom process could be served. The case holds:

"'The whole matter comes down to this; with certain exceptions, a transitory action can be brought in any jurisdiction in which the defendant is found. Code sec. 8640. Such an action, however, cannot be brought, in personam, in the jurisdiction in which the defendant is not to be found. A corporation, an artificial person, is not to be found in any jurisdiction or county unless the corporation maintains an office, agency, or resident director in that county.'"

The only exception is stated to be where the employer and employee submit a dispute for compensation "to the county judge or chairman of the county court in which the accident occurred" this proceeding is localized. However, this holding does not have the effect of localizing the other actions provided by the act, and overruling the repeated holdings of the Supreme Court that the action under this statute is transitory. To hold that all actions were localized to the

county of the accident would arbitrarily eliminate the quoted provisions of the act that the summons should be served as in other civil actions and that the suit might be instituted in the county of the petitioner's residence. This local action is restricted to where the dispute is submitted by the employer or employee to the judge or chairman of the county court of the county of the accident, as held in the case establishing this exception of *Bordens Mills, Inc.* v. *Manis*, 173 Tenn. 440, 121 S. W. (2d) 523-4.

This is a transitory action.

> "They are inherently transitory."
> *Chambers* v. *Stanford, etc.*, 154 Tenn. 134, 289 S. W. 533.

Petitioner may bring suit against the insurer alone.

Hartford Acc. etc. v. *Hay*, 159 Tenn. 202, 17 S. W. (2d) 904;

Central Surety, etc. v. *Court*, 162 Tenn. 477, 36 S. W. (2d) 907.

This action may be maintained against the employer and the insurer jointly.

Mutual Liability v. *Patrick*, 157 Tenn. 618, 11 S. W. (2d) 872.

Notwithstanding the above authorities sanction suit against the defendants separately or jointly, the district judge in his memo opinion says:

> "Under the Workmen's Compensation Act the employer may be sued where the accident occurred or elsewhere, as provided in the Act, where the employer has an office or place of business, but the employer may not be brought into a county where he has no officer or agent or place of business by serving process upon the insurer. The insurer may be sued under the act where the insured may be sued, but the insured may not be

brought into the insurer's venue by counter-part process."

His conclusion that insured could not be brought into insurer's venue by counter-part process is a holding of first impression. No case can be found in support and the holding established a favorite status for the insured, exempting it from the general law of the land in reference to venue, and it also exempts the insurer from suit in a county where it does business and maintains an agency. Both defendants are given a favorite status of exemption from the provisions of the general statutes of venue in a transitory action.

We must assume that the Judge adopted the insistence of the defendants that a proper construction of a sentence of the Act codified in section 6892, para. 4, justifies this conclusion. The said sentence reads as follows:

> "All policies insuring the payment of compensation under this act, . . . must contain a clause to the effect that as between the employer and the insurer or insurers the notice to our (sic) knowledge of the occurence of the injury on the part of the insured employer shall be deemed notice or knowledge, as the case may be, on the part of the insurer or insurers; *that jurisdiction of the insured for the purposes of this Act shall be jurisdiction of the insurer or insurers;* . . ." (Italics supplied.)
>
> Code Sec. 6885, para. 4.

This section deals with the contents of the policy or contract between the insurer and insured; it does not attempt to fix the venue of the employee's cause of action. The Act in another section expressly takes care of the venue where it provides:

> "Said summons shall be served on the defendants as in other civil actions . . ."
>
> Code Sec. 6885, para. 2.

In construing the Act a construction should be given it to constitutional requirements if possible.

The Judge's construction is unconstitutional for it is a suspension of the general law for the benefit of the defendants and is inconsistent with the general law of the land and directly in violation of Article 11, sec. 8 of the State Constitution.

And the holding in contrary is the holding of the State Supreme Court which has construed the act without special favor and held that the general law in reference to venue is applicable. It is the duty of the district court to follow the state court's construction.

As authority for the unconstitutionality of the district Judge's conclusion in the construction of the state statute, the following case in point is cited.

Town of McMinnville v. *Curtis*, — Tenn. —, 192 S. W. (2d) 998.

2. Had the position of the defendants been well founded, we think under the facts of this case, the court should have applied the rule of "*forum non conveniens.*" The plaintiff is a very poor person, she could attend court with her witnesses in an adjoining county where the district court is held without too great inconvenience, but the purpose of this motion on venue was to require her to journey to a distant county (Roane) and refile her bill before the same chancellor in order that the defendants might remove the case before the same federal judge sitting at Knoxville, Tennessee, which circumlocution was of no benefit to the defendants, except the case will be tried in the home town of the defendant's attorney.

Williams v. *Green Bay & W. R. Co.*, — U. S. —, 66 S. Ct. R. 284.

The rule especially should apply, if the federal courts have statutory jurisdiction, when the plaintiff could have instituted her suit, under the federal statutes, in the federal court of the division from which she was repelled, the question of diversity of citizenship being the sole ground of removal.

> "Suits shall be brought only in the district of the residence of either the plaintiff or the defendant."
> 28 U. S. C. A. sec. 112.

Conclusion

In concluding this brief on behalf of the respondent, counsel thinks it appropriate to make this observation.

Opposing counsel in his petition for certiorari states that "numerous Workmen's Compensation cases are now pending in the Federal District Courts of Tennessee" and that this demonstrates the importance of this Court taking jurisdiction in order that the doors of the Federal Courts shall remain open in cases of this character. We think otherwise and that the public interest would be better upheld by a denial of this petition. The statement above that numerous cases are pending is emphatic in showing the harassment pauper litigants are subjected to in seeking to obtain the benefits of a state statute designed to relieve society of the burden of caring for injured or deceased workmen's dependents. Most of them are represented by counsel with very little experience with the practice in the federal courts and this procedure of removal is productive of an inducement on the part of the pauper to seek to avail himself of the compromise provisions of the Act in preference to trying the case on the merits, to his detriment and to the advantage of the insurer, who is paid to compensate the pauper for injuries sustained in industry and the burden

of preventing the dependent from becoming a public charge falls again upon the public.

It is respectfully submitted that the petition for certiorari be denied.

FANNIE M. FLOWERS,
Respondent.

PORTRUM & PORTRUM,
Counsel for Respondent.
By HAL E. PORTRUM,
Rogersville, Tennessee.

APPENDIX

Exhibit "A" to Motion to Dismiss Certiorari Petition

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

Filed 17 day of July 1946. Ent'd Civil Order Bk. 3, p. 70. Carroll Cate, Clerk. By Eva Lee, Dep. Clk.

Civil Docket No. 262

MRS. FANNIE M. FLOWERS

vs.

AETNA CASUALTY & SURETY Co. et al.

Rec'd and Filed July 25th, 1946. (Signed) Juno G. Altom, C. & M.

ORDER OF REMAND

This day came the plaintiff and presented in open court the mandate of the United States Circuit Court of Appeals for the Sixth Circuit, heretofore filed herein, and moved the Court to remand this case to the Chancery Court of Hawkins County, Tennessee;

And it appearing from said mandate that the said Circuit Court of Appeals has directed that this case be remanded to the said Chancery Court it is accordingly ordered that said motion of the plaintiff be and the same is hereby granted, and that this cause be and the same hereby is remanded to the Chancery Court of Hawkins County, Tennessee, for further proceedings.

It is further ordered that the plaintiff have and recover of the defendants and surety on their removal bond, the costs incurred in this court, for which execution is awarded.

To the said action of the Court in remanding this case as aforesaid the defendants excepted and now except.

Approved for entry:

(Signed) GEO. C. TAYLOR,
District Judge.

(S.) PERTRUM & PORTRUM,
Counsel for Plaintiff Rogersville.

(S.) CLYDE W. KEY,
Counsel for Defendants.

7-8-46.

Attest: A true copy. Certified this July 17, 1946.

CARROLL CATE,
Clerk,

(Signed) By EVA LEE,
Deputy Clerk.

[SEAL.]

I certify that the foregoing is a true copy of order to remand filed in the Chancery Court for Hawkins County, Tenn., July 25th, 1946, in the cause styled Fannie M. Flowers vs. Aetna Casualty & Surety Co. et al. This July 30, 1946.

(S.) JUNO G. ALTOM,
Clerk & Master.

[SEAL.]

EXHIBIT "B"

IN THE CHANCERY COURT FOR HAWKINS COUNTY, TENN.
No. 1565.

MRS. FANNIE M. FLOWERS

vs.

AETNA CASUALTY & SURETY COMPANY, et al.

Filed April 19th, 1946. (Signed) Juno G. Altom, C. & M.

PLEA IN ABATEMENT

The defendants Aetna Casualty & Surety Company and J. A. Jones Construction Company, for plea in abatement say:

1. That the accident alleged by complaintant to have resulted in the death of her husband, Edward E. Flowers, occurred in Roane County, Tennessee, where the said Edward E. Flowers was regularly employed by defendant J.

A. Jones Construction Company; that at no time has the defendant J. A. Jones Construction Company engaged in business in Hawkins County, Tennessee, nor had therein any officer, director, agent or any other person upon whom leading process might lawfully be served in said County. Upon the date of said alleged accident, and continuously thereafter, the defendant J. A. Jones Construction Company has had and now has general offices, officers, and agents upon whom leading process may lawfully be served in Roane County, Tennessee. Accordingly, the Chancery Court of Hawkins County, Tennessee, does not have jurisdiction of the cause of action alleged in complainant's original bill, or of these defendants, the venue of said alleged cause of action being limited to Roane County, Tennessee (Brown *vs.* Stone & Webster Engineering Corporation, 181 Tenn., 293).

2. The defendant J. A. Jones Construction Company at the time of the filing of this suit or of the service of process, was not to be found in Hawkins County, Tennessee, process having been served upon it in Knox County, Tennessee.

Wherefore, the defendants pray that complainant's suit be abated.

(Signed) CLYDE W. KEY,
Solicitor for Defendants.

STATE OF TENNESSEE,
Knox Count, ss:

Clyde W. Key makes oath that he is attorney and agent of the defendants J. A. Jones Construction Company, a corporation, and Aetna Casualty & Surety Company, a corporation, and duly authorized in the premises, and that the averments of the foregoing plea in abatement are true in substance and in fact.

(Signed) CLYDE W. KEY.

Sworn to and subscribed before me, this April 18, 1946.

(Signed) OVA M. PEDIGO,
Notary Public.

[SEAL.]

Attest: I certify that the foregoing is a true copy. This July 30, 1946.

(S.) JUNO G. ALTOM,
Clerk & Master.

[SEAL.]

EXHIBIT "C"

No. 62

IN THE CIRCUIT COURT OF HAWKINS COUNTY, TENNESSEE

FANNIE M. FLOWERS

vs.

AETNA CASUALTY & SURETY COMPANY, et al.

and

No. 1565

IN THE CHANCERY COURT OF HAWKINS COUNTY, TENNESSEE

MRS. FANNIE M. FLOWERS,

vs.

AETNA CASUALTY & SURETY COMPANY, et al.

STIPULATION

It is stipulated and agreed by and between counsel for the respective parties that the deposition of Captain Frank A. Inda, who now resides in Rochester, New York, a witness in behalf of the defendants, may be taken before any Notary Public of the State of New York at such time and place as may be convenient to the witness and to counsel for defendants, without any further notice to counsel for plaintiff. In the taking of said deposition all formalities as to caption, certificate, transmission, etc., are waived, and it is agreed that the deposition, when taken pursuant to this stipulation, may be introduced in evidence upon all trials of each of these cases, subject to exception only for incompetency, irrelevancy and immateriality of testimony.

It is further stipulated and agreed that after said witness has been examined orally and his testimony transcribed, counsel for the plaintiff shall be afforded the opportunity of examining such transcript, and to thereupon submit such cross-interrogatories as they may desire, which cross-inter-

rogatories are to be answered by the witness, and such cross-interrogatories, together with the witness' answers thereto, shall be and become a part of the deposition of the witness.

This August 9, 1946.

(S.) PORTRUM & PORTRUM,

———,

Counsel for Plaintiff.
Counsel for Defendants.

CERTIFICATE

This is to certify that the foregoing stipulation was executed in triplicate on August 9, 1946, of which the above is a true copy.

This September 5, 1946.

———,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 432.—October Term, 1946.

Aetna Casualty & Surety Company and J. A. Jones Construction Company, Petitioners, v. Mrs. Fannie M. Flowers.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 10, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This action for death benefits under the Workmen's Compensation Law of Tennessee (Tenn. Code Ann. 1934, § 6851 *et seq.*) was commenced in 1945 by plaintiff-respondent in the Chancery Court of Hawkins County, Tennessee. The defendants-petitioners are the former employer of her deceased husband and the employer's insurance carrier. Service was had on the insurance carrier in Hawkins County, and on the employer in Knox County. Respondent is a citizen of Tennessee, the employer is a North Carolina corporation, and the insurance carrier is a Connecticut corporation. The complaint alleged that respondent's husband died as the result of an accident occurring in the course of his employment. Burial expenses plus benefits in the amount of $5,000, the maximum under the Tennessee statute,[1] were sought on

[1] Death benefits are provided in the amount of 60% of the average weekly wages of the employee (as computed in accordance with Tenn. Code § 6852 (c)), but payments may not exceed $18 per week, nor continue for more than 400 weeks. § 6880; § 6883 (17). In addition there is a ceiling of $5,000 on total benefits exclusive of burial and certain other expenses. § 6881. See *Haynes v. Columbia Pictures Corp.*, 178 Tenn. 648, 162 S. W. 2d 383. The complaint alleged that 60% of the average weekly wages for the statutory period would exceed $5,000.

behalf of respondent and her two minor children, aged twelve and fifteen.

On May 28, 1945, petitioners mailed a notice of intention to file a petition for removal to a federal District Court which was received by respondent's attorney on the morning of May 29. The petition for removal was filed in the Chancery Court the same day, and on June 5, the removal order issued. In the federal court the petitioners moved for dismissal on the ground that venue was not properly laid in the Hawkins County Court, so that under Tennessee law that court had lacked jurisdiction.[1] Respondent sought a remand of the case to the state court, contending that the requisites of diversity jurisdiction had not been met either as to jurisdictional amount, or as to proper notice of filing of the removal petition and that the suit was not removable because not one of a civil nature in law or equity. The District Court concluded that Hawkins County was not the proper venue. It thereupon dismissed the action without reaching the questions raised by respondent's motion for a remand.

The judgment was reversed on appeal. 154 F. 2d 881. The Circuit Court of Appeals held that the jurisdictional minimum of $3,000 in controversy (Judicial Code § 24, 28 U. S. C. § 41 (1)) was not present, and therefore ordered the case remanded to the state court. In this disposition the Circuit Court of Appeals reached neither the state venue question raised by petitioners, nor respondent's contention that the required notice of the filing of the removal petition was lacking. We granted certiorari because of an apparent conflict with *Brotherhood of Locomotive Firemen* v. *Pinkston*, 293 U. S. 96, as to the jurisdictional minimum requirement.

[1] The contention was that proper venue lay only in Roane County where, it was alleged, the accident occurred and the business of the employer is conducted. It was argued that service on the insurer in Hawkins County did not give the Hawkins County Court jurisdiction of the case.

First. It is suggested that a decision of a Circuit Court of Appeals ordering remand of a case to a state court is not reviewable. And it is also said that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court.

An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here. Judicial Code § 28, 28 U. S. C. § 71; *Kloeb* v. *Armour & Co.*, 311 U. S. 199; *Metropolitan Casualty Ins. Co.* v. *Stevens*, 312 U. S. 563; *United States* v. *Rice*, 327 U. S. 742. But no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to a state court. *Gay* v. *Ruff*, 292 U. S. 25. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction. *Carr* v. *Zaja*, 283 U. S. 52, and cases cited.

Second. We think that the jurisdictional amount of $3,000 was involved in this suit. The contrary conclusion of the Circuit Court of Appeals was based on the nature of the award under the Tennessee statute. The award may be paid in installments at regular intervals by the employer or by a trustee with whom the amount of the award, reduced to present value, has been deposited. Tenn. Code § 6893. Moreover, the death or remarriage of respondent, plus the death or attainment of the age of eighteen by the children, would terminate all payments. Tenn. Code § 6883. Since an award to respondent would be payable in installments, and by operation of conditions subsequent the total payments might never reach $3,000, the Circuit Court of Appeals concluded that the jurisdictional amount was lacking.

If this case were one where judgment could be entered only for the installments due at the commencement of the suit (cf. *New York Life Ins. Co.* v. *Viglas*, 297 U. S.

672, 678), future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued. *Wright* v. *Mutual Life Ins. Co.*, 49 F. 2d 117, aff'd. 276 U. S. 602. Cf. *Button* v. *Mutual Life Ins. Co.*, 48 F. Supp. 168. But this is not that type of case. For the Tennessee statute which creates liability for the award contemplate a single action for the determination of claimant's right to benefits and a single judgment for the award granted. See Tenn. Code §§ 6880, 6881, 6890, 6891, 6893; *Shockley* v. *Morristown Produce & Ice Co.*, 171 Tenn. 591, 106 S. W. 2d 562.

Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction. It has held that a possibility that payments will terminate before the total reaches the jurisdictional minimum is immaterial if the right to all the payments is in issue. *Brotherhood of Locomotive Firemen* v. *Pinkston*, *supra*; *Thompson* v. *Thompson*, 226 U. S. 551. Future payments are not in any proper sense contingent, although they may be decreased or cut off altogether by the operation of conditions subsequent. *Thompson* v. *Thompson*, *supra*, p. 560. And there is no suggestion that by reason of life expectancy or law of averages the maximum amount recoverable can be expected to fall below the jurisdictional minimum. Cf. *Brotherhood of Locomotive Firemen* v. *Pinkston*, *supra*, p. 101. Moreover, the computation of the maximum amount recoverable is not complicated by the necessity of determining the life expectancy of respondent.[3] Cf. *Thompson* v. *Thompson*, *supra*, p. 559; *Brotherhood of Locomotive Firemen* v. *Pinkston*, p. 100.

[3] See note 1, *supra*.

Third. Respondent, as is her right, *United States* v. *Ballard*, 322 U. S. 78, 88, and cases cited, seeks to support the action of the Circuit Court of Appeals on other grounds. But those questions were not passed upon by that court nor adequately presented here. So we deem it more appropriate to remand the case to the Circuit Court of Appeals so it may consider those questions. *United States* v. *Ballard*, *supra*.

Reversed.